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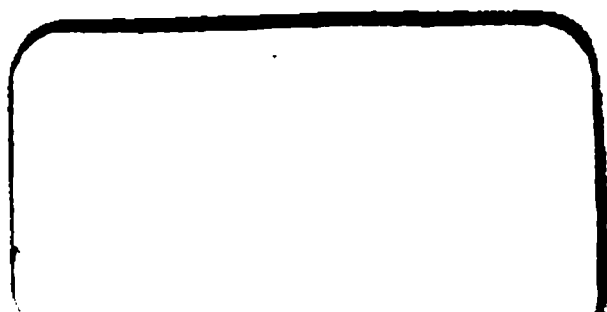
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ILLINOIS
CIRCUIT COURT REPORTS

REPORTS OF CASES

DECIDED IN THE

**CIRCUIT, SUPERIOR, CRIMINAL, PROBATE,
COUNTY AND MUNICIPAL COURTS**

IN

ILLINOIS

AND INCLUDING THE

**UNREPORTED DECISIONS OF THE SUPREME COURT
OF ILLINOIS**

EDITED AND ANNOTATED BY

FRANCIS E. MATTHEWS

AND

HAL CRUMPTON BANGS

OF THE CHICAGO BAR

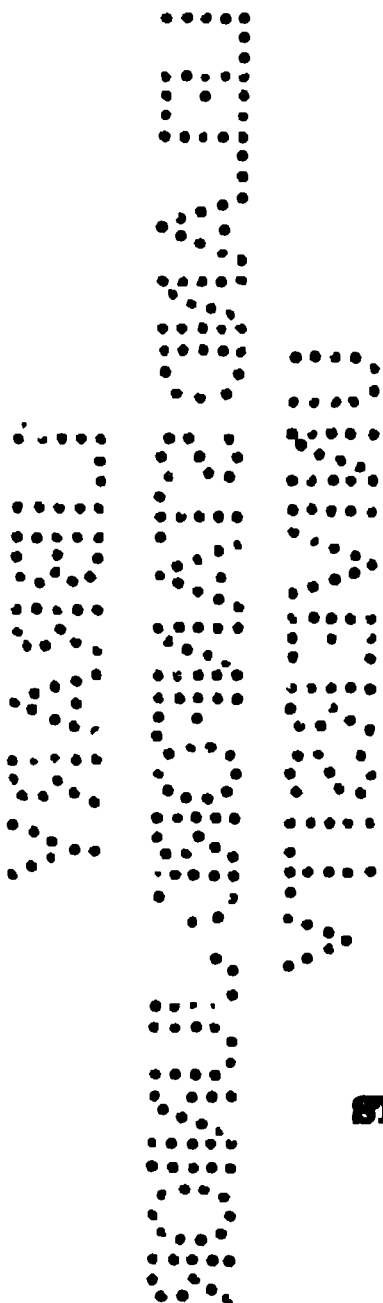
VOLUME I

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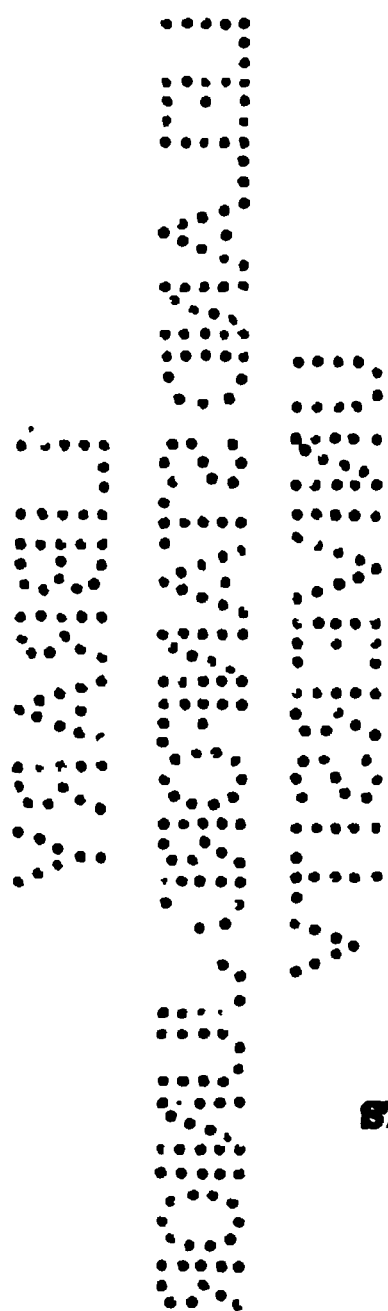
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PREFACE.

The editors feel that they owe no apology for the publication of the present series of reports. It is doubtless true that there are too many law books, but this criticism is not justly directed against a report of adjudged cases. The general principles of law are well settled and the difficulties arise not in the determination of those principles, but in their application to the varying facts and circumstances of the particular case. The practice of the law thus necessitates a continual search for precedent. A decision of a *nisi prius* court may become of great value, especially where the supreme or appellate court has not passed upon the question. It is a well-known fact that many of the most important cases are finally adjudicated, without an appeal, in the lower courts. In many of these cases judges of unquestioned learning and ability have filed carefully prepared opinions. A few of these opinions have been published in the legal periodicals, but inasmuch as the contents of such periodicals are not digested, the opinions are consequently inaccessible.

The late lamented Murray F. Tuley was a judge of the circuit court of Cook County for many years. During the course of his service he prepared opinions in a great many of the most important cases that came before that court. As the entire Illinois bar knows, Judge Tuley was great both as a lawyer and as a jurist. His wisdom, learning and experience justly earned for him the title of the "Nestor of the bar." His opinions evidence the clearness of his reasoning,

the thoroughness of his methods and his extensive knowledge of the principles of the law. Although Judge Tuley's opinions are a mine of buried wealth—and many of them have been followed by the supreme and appellate courts and even cited by the courts of foreign states—few of them have been published. We understand it was Judge Tuley's intention to publish his opinions, but the continual press of public business rendered this impossible. Through the kindness of Mrs. Tuley, the editors have secured Judge Tuley's manuscript opinions, and those from which no appeal was taken will be published in the present series. Many other opinions of value have been secured by the editors and will also be published. It is also the intention to include the unreported opinions of the supreme court.

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CIRCUIT COURTS OF ILLINOIS.

(Circuit Court of Cook County. In Chancery.)

Isaac Platt

vs.

**National Association of Retail Druggists, Thomas W.
Wooten, Fuller & Fuller Company, et al.**

(Jan. 24, 1905.)

1. **CONTRACTS—RESTRAINT OF TRADE—FIXING RETAIL PRICE.** Contracts between manufacturers of proprietary medicines and wholesale dealers fixing the price at which such medicines shall be sold by the wholesale dealers to retail dealers, and by which the wholesale dealers agree not to sell such medicines to such retail dealers as are placed upon a list by the manufacturers (such list comprising the names of those dealers who sell the proprietary medicines at less than the regular retail prices) are not in unlawful restraint of trade and competition.
2. **INJUNCTION—CONTRACTS IN RESTRAINT OF TRADE—COMPLAINANT'S REMEDY.** Where a person is not a party to a contract in restraint of trade, he has no standing to call upon a court of equity to interfere. The remedies imposed by the legislature for violations of the anti-trust laws ought to be pursued, and where the matter is not the construction or the enforcement of a contract between the parties who appear in the court, a court of equity ought not to take jurisdiction.
3. **INJUNCTION TO COMPEL COURSE OF DEALING WILL NOT LIE.** There is no way in which a court of equity can make one man trade with another. If a merchant puts himself in a position where he holds himself out to sell to everybody on the same terms, it may be that an action at law will lie against the merchant for any damages that a party may sustain to whom he refuses to sell, but there is no method of proceeding in equity to make that merchant sell to that individual unless he wants to. He may refuse to trade with him from mere caprice.
4. **COURTS OF EQUITY—SUPERVISORY POWER OF.** A court of equity cannot undertake to supervise the entire wholesale drug trade in

a city and see that the wholesalers sell goods to complainant or any one else.

5. **TEMPORARY INJUNCTION—WHAT THE COURT WILL CONSIDER IN GRANTING.** The court, in granting an application for a temporary injunction, must always look upon what may be called the balance of equity or of damages.
6. The complainant was a dealer in patent or proprietary medicines some of which he sold at "cut" or less than the regular prices. Manufacturers of these proprietary medicines had entered into contracts with wholesale druggists binding the wholesalers not to sell the medicines except at a prescribed scale of prices, and not to sell to retail dealers who cut the regular prices on such medicines. Complainant's name was placed on the list of retailers to whom the wholesalers were forbidden to sell such patent medicines, and as a result he was unable to purchase these medicines from the wholesalers. Complainant applied for an injunction against certain of the wholesale druggists of Chicago, the National Association of Retail Druggists, and others, enjoining any discrimination on the part of the wholesale merchants against him in the purchase of any of those medicines that he may offer to buy at current prices, the same prices paid by others, and also enjoining the National Association of Retail Druggists from "blacklisting" him as an "unfair" druggist who cuts rates, and to whom none of these proprietary medicines is to be sold because of his practice of selling below the fixed price. *Held* that a temporary injunction could not be granted.

Bill for injunction, Circuit Court Cook County, Chancery Gen. No. 258,958. Heard before HON. MURRAY F. TULEY, upon bill and answer, with affidavits in support of each.

For statement of facts see opinion.

A. E. Gammage, for complainant.

Holt, Wheeler & Sidley, Pease, Smietanka & Pease, Steele & Thompson, J. M. Errant and *C. Lane*, for defendants.

TULEY, J. (orally) :—

I have not been able to give to this case that mature consideration that I would have desired to give in a matter of such great importance. I realize the importance of the matter now pending.

The bill is brought by Isaac Platt of Chicago, a retail druggist, alleging, in substance, that for ten years and more

he has been a druggist in the city of Chicago carrying on his business. Without going into the details of the bill, which is quite lengthy, I will state the substance of the bill as to the matters and points in controversy.

He alleges that it is necessary for the successful carrying on of his business that he should purchase and keep on hand certain medicines, known as proprietary medicines, such as "Peruna," "Pierce's"—different medicines manufactured and sold from Buffalo, "Miles' Remedies," the preparation of which is based on what are known as "trade secrets."

He alleges, in substance, a conspiracy between the National Association of Retail Druggists and the defendants, who are wholesale druggists in the city of Chicago, and the manufacturers of these proprietary medicines, to prevent his purchasing and selling these proprietary medicines and other medicines; a conspiracy to deprive him of the right to keep such medicines in stock, buy them in the open market and sell them to his customers at whatever price he thinks proper to sell them.

He seeks an injunction against the wholesale merchants, the National Association of Retail Druggists and others, enjoining any discrimination on the part of the wholesale merchants against him in the purchase of any of those medicines that he may offer to buy at the current prices, the same prices paid by others, and also against the National Association of Retail Druggists from "blacklisting" him, as an "unfair druggist" who cuts rates, and to whom none of these proprietary medicines are to be sold, because of his practice of selling below the fixed price.

In substance, he asks a mandatory injunction commanding (in effect) the wholesale druggists of this city to sell him these medicines at current prices.

It is sufficient to state that the defendants come in and by their answers deny all conspiracy, combination or collusion.

The facts in this case are substantially undisputed; it is a question entirely of law.

The facts appear to be that the National Association of Retail Druggists recommended—and it may be said that the

evidence tends to show that they are acting upon an understanding, if not in collusion with the proprietors of these medicines,—to put in force in the trade what has come to be known as the direct contract and serial number plan of operations.

The direct contract plan appears to have had its origin in England, and a case is reported as far back as the 2nd Chancery Reports, *Elliman v. Carrington* ([1901] 2 Ch. 275), which I believe arose in regard to a certain secret preparation, a medicine, both for horse and man.

It was afterwards adopted in Canada by what is known as the Liquid Ozone Company, manufacturing liquid ozone by a secret process, and was subsequently adopted in this country by the National Association of Retail Druggists and manufacturers of certain proprietary medicines.

The plan is simply a contract plan, and consists in this: The manufacturer of the medicine gives notice to the world that he will only sell to wholesale merchants and jobbers upon a condition that they enter into a contract with him or with his company, by which the wholesale merchant is appointed a distributing agent of the proprietor of the medicine. He is termed an agent, but it is in reality a sale and must be so treated and considered.

The form of the contract prescribed by the manufacturer is set out in one of the answers, and probably will give a better idea of it than any statement I might make, namely, the answer of Fuller & Fuller. That sets out the contract, which is in duplicate, and purports to be an agreement made the blank day of blank, between the "World's Dispensary Medical Association of Buffalo" (which sells quite a number of these medicines, I believe Pierce's medicines), "and the Fuller & Fuller Company," who, in the contract, are termed "the undersigned." The World Dispensary Medical Association appoints the undersigned as one of its "wholesale distributing agents for its proprietary remedies, the undersigned agreeing to distribute the said remedies on the terms and conditions following:"

"The undersigned agrees to refrain from selling said As-

sociations' preparations at any price, either directly or indirectly, to any individual, firm or corporation, whom the said Association may, by written or printed notice, duly stamped and mailed to the undersigned, designate as not entitled to deal in its proprietary medicines. The sale of the World's Dispensary Medical Association preparations must be confined to legitimate retail dealers in proprietary medicines in good standing, and the undersigned agrees in case he, or any agent or employe shall wilfully violate any of the provisions of this contract, on proof of such violation he will pay the sum of \$50 as liquidated damages; he must allow no greater discount than is rutable in the section of the country where the sale is made. And

"In consideration of the granting to the undersigned by the World's Dispensary Medical Association * * * the above rebates and conditions in the distribution of the several preparations of its manufacture, and of the appointment of the undersigned as one of the wholesale distributing agencies of said Association," agrees "not to distribute or deliver or allow to be delivered, directly or indirectly, any of the preparations manufactured by the World's Dispensary Medical Association, and delivered to the undersigned by said Association below the prices fixed and established in the following." Then follows a list of prices for Pierce's Golden Medical Discovery, Pierce's Favorite Prescription, Pierce's Pleasant Pellets and so on, some eight or ten of them.

The proprietor, or I think probably the National Association of Retail Druggists, aids in the expense of sending a notice to the wholesale merchants monthly, containing the names of all persons who have cut rates upon the medicines supplied them. The proprietor has, upon his medicine, a fixed price, say, for instance, of \$1.00 per bottle, and any one found selling at a less price is put upon what might be termed the "blacklist" or "list of unfair purchasers." The wholesale merchant is notified not to sell to such parties; if he does, then the contract between him and the proprietor is annulled, all medicines they make, are withdrawn from him, and he cannot procure them upon any terms whatever.

Mr. Platt, the complainant in this case, it appears, sold these medicines at cut rates, and along in the year 1902 he commenced a similar suit to the present in this court, which was heard before Judge Dunne, seeking an injunction against the wholesale merchants refusing to sell him goods, they having refused because he sold at cut rates, and because they had been notified that they were not authorized to sell him these goods by the proprietor, the manufacturer of the medicine. A temporary injunction was issued—I think it issued without notice, but I am not sure, it is immaterial, however. For some time the injunction was respected and he succeeded in procuring his supplies.

Last fall, or in the beginning of December, it appears that he was refused any more medicines by different wholesale merchants, on the ground that his name appeared as an unfair purchaser and they were prohibited by their contracts from selling him any medicines of those particular makes. Thereupon he filed this bill.

I would state that the suit commenced before Judge Dunne, by mutual agreement or some understanding arrived at between the parties, was dismissed, the understanding of Mr. Platt being and it being acted upon largely, that he could have his medicines the same as any other retail druggist and he did procure them until this last fall when they commenced to refuse him and finally all of them did refuse to sell him these medicines at the current rates or at any price.

The wholesale merchants set up this contract, and they say, in substance, we need these medicines in carrying on our businesses, they are necessary for the successful supplying of our customers with what they desire. We can only get them upon the condition that we shall only sell to such persons as the proprietor designates, or at least we shall not sell to those to whom he says no sale is to be made, and also on the condition that all retail druggists that we sell to shall obligate themselves to maintain the prices marked upon the goods, that is, the current price, for instance, a dollar a bottle.

One of the wholesale merchants did violate this contract and the consequence was that he was notified that if he continued to sell Mr. Platt medicine, that the distributing or the agency for these medicines would be withdrawn from him and he could not obtain them upon any terms whatever. He was obliged then to say to Mr. Platt that he could no longer make a sale to him.

It is contended, on behalf of the complainant, that this arrangement between the proprietor and the wholesale merchants is in restraint of trade and prevents competition; that is, it prevents competition between the retail druggists.

It would appear to be undisputed and that there is no answer to the proposition that if A, the proprietor, sells to B and C, retail druggists, at one and the same price, on condition that B and C shall resell at a fixed price, there can be no competition in the sale of the medicines between B and C. It is in restraint of competition to that extent.

But the question arises, does it follow, necessarily, that whatever prevents competition as to price is unlawful?

If this contract that is forced upon the wholesale merchants by the proprietor, is a lawful contract, if they had a right to make it, then it cannot be held to be illegal competition or unlawful competition or to produce unlawful competition. As I intimated upon the argument, in my opinion the question in this case depends upon the validity of the contract in question. If that contract is lawful, there can be no restraint of trade. Has the manufacturer of a proprietary medicine (which is a trade secret) the right to fix the price at which his medicine shall be sold to the consumer, is the direct question involved. There is no contention that the price is an unreasonable one.

There is no question under the authorities but that the possessor of trade secrets, parties manufacturing under trade secrets and patentees, stand upon the same footing. They are both recognized by law as lawful monopolies.

If the law gives a patentee the sole and exclusive right to manufacture a certain article, it is necessarily a monopoly, and if it gives the proprietor of a trade secret preparation

or medicine the right to manufacture and sell it, and nobody else can do so, then that is also a monopoly.

The patent monopoly runs through the life of the patent, and the other monopoly runs through the life of the trade secret so long as it remains a trade secret unpublished to the world or undiscovered.

Now, this arrangement known as the direct contract plan first came before the court in England in the case of *Elliman v. Carrington* (1901) 2 Ch. 275, 84 L. T. Rep., N. S. 58, the opinion by Mr. Justice Kekewich. In that case (an excerpt from which I will read) he states the question very pointedly and very specifically.

“The defendant’s point is that this written contract into which they have entered” (and it was, as I said a contract on the direct contract plan the same as the one before the court) “must be treated as waste paper in a court of law; that is to say, that no action can be brought upon it. That result follows, they say, from the fact or conclusion of the law, which they allege—namely, that the contract is in restraint of trade. In one sense no doubt that is perfectly true, because one of the contracting parties is not at liberty under the contract to do what he pleases with the goods which he purchases. But it is necessary to see what the contract really is. The plaintiffs are the manufacturers of Elliman’s Royal Embrocation for horses and cattle, and Elliman’s Universal Embrocation for human beings. They are not bound to sell the Embrocation at all; they are not bound to manufacture it. They are at liberty to do as they please, and when they have manufactured it, they are at liberty to sell it at whatever price they choose to fix; it may be a prohibitive one, or it may be such a small price that they cannot make any profit out of it. That is entirely for their consideration. There are no goods which the owner thereof may not lawfully retain or sell at such a price as he pleases.

* * * Carrington & Son are minded to buy Elliman’s Embrocation with a view to selling it again, that is to say, to buy wholesale in order to sell to others retail, and Elliman, Sons & Co. make a bargain with them that they shall not sell it below certain prices. That part of the bargain

has not been broken. And, that when they sell to others, they will procure from those others an agreement that they will not sell it below certain prices. That part of the bargain has been broken. Why should not Elliman, Sons & Co. be at liberty to fix the price in that way? Nobody has argued, and it could not possibly be argued, that they are not at liberty to fix the price on the first sale to Carrington & Son. Why should they not be at liberty to make the further bargain with Carrington & Son that they shall not sell it below a certain price? It is said that the contract is in restraint of trade. In one sense it is, but it is just as much and no more in restraint of trade for Elliman, Sons & Co., to say that they will not sell at all. It seems to me, to say the least, that what is restraint of trade as regards Carrington & Son is really the liberty of trade as regards Elliman, Sons & Co. The cases which have been cited are well known authorities expounding a great principle, and showing what exceptions there are to that principle. But this case seems to me not to fall within any principle or exception. I do not think it is touched by the authorities at all. It is merely a question of whether a man is entitled, when he is selling his own goods, to make a bargain as to the use to be made of them by the purchaser. It is said that the contract is against public policy, but that phrase merely embodies for the present purpose the great principle of restraint of trade, and to say that it is to prevent Elliman, Sons & Co. from exercising their own discretion, seems to me to be applying a well settled principle of law to facts to which it cannot have any possible application. If that principle is to be applied, to such a case, it must be applied elsewhere, but I cannot myself see that it has any application at all. On the question, therefore, as to the validity of the contract. I am entirely against the defendants."

In a case reported in the 67 Northeastern Reporter, page 136, the case of *Park & Sons Co. v. The National Wholesale Druggists' Association* (175 N. Y. 1), I find the following in the syllabus:

"The manufacturers of certain proprietary medicines and an Association of wholesale dealers therein entered into an

agreement to sell the goods at a uniform jobbing price for fixed quantities, only to such dealers as would conform to the manufacturers' price list in making sales of goods. All wholesale dealers had the right to purchase the goods from the manufacturers upon the same terms as members of the Association, on agreeing to maintain the prices established by the manufacturers. *Held* not to establish a monopoly on the part of the members of the Association.

“Where the manufacturers of patent medicines and an Association of wholesale dealers entered into an agreement by which the Association were to maintain the prices established by the manufacturers, the contract is not unlawful, as in restraint of trade, though it abolishes competition as to prices, where it places no restriction as to the quantities that the dealers may sell, or the territory in which they may transact business.”

The decision I am reading from is that of the court of appeals of New York, April 28, 1903. The case further holds:

“The fact that manufacturers of patent medicine refuse to sell their goods to a wholesale dealer, except at retail prices, or to allow commissions on the goods purchased, does not show a boycott, where the refusal is grounded on the unwillingness of such wholesale dealer to maintain the selling prices established by the manufacturers.

“An injunction will not issue to prevent the members of the Wholesale Druggists' Association from watching the business place of a wholesale dealer to determine what druggist furnished him with proprietary articles in violation of their contract with the manufacturers.

“Equity will not restrain wholesale dealers in proprietary medicines from persuading manufacturers to establish uniform prices for fixed quantities of their goods, so as to enable small concerns to purchase as cheap as large ones, and compete with them in the retail trade.

“Where a druggist purchases the goods of the proprietor of a patent medicine under an agreement that he will maintain the price fixed by the manufacturer for sale to the con-

sumer, he is liable to respond in damages if he violates such contract.

“Where manufacturers of patent medicines have contracted with the wholesale dealers therein, to handle their goods at a uniform price, the fact that such wholesale dealers furnished the manufacturers with a list of dealers who were cutting the established price, does not show unlawful blacklisting.”

Now, the contract in that case was substantially the contract here. The case is too long to read; it went up on demurrers, was very ably presented by different members of the court, and a very exhaustive discussion of the question was had. In other words, they sustained the contention that the manufacturer of proprietary medicine has the right to say to the wholesale dealer, I will sell you at a certain fixed price; you shall be appointed one of my agents, distributing agents, to sell these goods, on condition that you shall sell only to persons in good standing in the retail drug business, who will sell and agree to sell at the price fixed by the manufacturer of those goods; if I notify you that any person to whom you have sold has violated the agreement, by selling at cut rates, then you are no longer to sell to him, otherwise our contract will be annulled.

They hold that such an agreement in consonance with the decision of the court in the second chancery report ([1901] 2 Ch. 275) referred to is a valid and binding agreement and the reason for it is that manufacturers under trade secrets and patentees, by law, have a monopoly. There can be no competition in the manufacture of a particular article. The manufacturer who is manufacturing under a trade secret owns a property interest in that trade secret and he can dispose of his manufacture upon such terms as he desires. He can fix the rate at which his goods shall be sold, not only by the wholesale dealer, but by the retail dealer to the consumer.

It is well known that as to patented articles the patentee has a right to fix the price at which his article that he manufactures shall be sold to the consumer; it is done all over the country and it has been repeatedly recognized by the courts as good law that the manufacturer, under trade secrets, stands

exactly upon the same footing as the owner of a patented article.

Another strong case is in the 186 U. S., page 70, in a case against the National Harrow company (*Bement v. National-Harrow Co.*, 186 U. S. 70). See also *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629, and *Standard Fireproofing Co. v. St. Louis Co.*, 177 Mo. 559, 76 S. W. 1008.

There are numerous other cases that were cited by counsel, one in regard to the Edison pronograph and talking machines¹ and a number of others where the same rule has been recognized, that the manufacturer of a patented article or of an article manufactured under a trade secret has the right to sell, fix the price under which the article that he sells shall be sold in the market to the consumer.

That being the case, why should the injunction issue? It appears to be admitted that in matters of general merchandise which are not patented, or not made under trade secrets, that the rule invoked by counsel that any kind of a combination, even to keep up prices, is in restraint of trade. That this rule does not apply to patentees or manufacturers under trade secrets, appears to be well established by the authorities.

In this case, the manufacturer of proprietary medicines under trade secrets, fixes the price. I cannot see, under the authorities, why it is in restraint of trade, nor why if it is in restraint of competition, the manufacturer has not a right for his own protection to say that his article shall not be sold below a certain price in the market. Experience appears to have demonstrated that unless he does so his business will be utterly demoralized. It is contended here, and there is some evidence tending to show, that this thing of cutting rates in the sale of proprietary medicine did demoralize the business. The wholesalers and the defendants here allege that as a result of that practice, a great many retail druggists who

¹ *Edison Phonograph Co. v. Pike* 116 Fed. 863; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424; *National Phonograph Co. v. Schlegel*, 128 Fed. 733; *Edison Phonograph Co. v. Kaufman*, 105 Fed. 960.—Ed.

ought to keep these medicines, refuse to keep them because they say there is nothing in it for them, they could not make anything by doing so, and that the cutting of rates had so demoralized the sale of those medicines that they would not handle them any longer. It is to the interest of the manufacturer that his medicines should be widely distributed, should be sold at every drug store, if possible, and in order to protect his own business, he is obliged to make a fixed rate and demand that all these parties should sell at those rates.

The decision—the only decision really, that touches the doctrine contended for by complainant and upon which they appear to have founded their case, is in the 137 Ind. (*Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588), cited by counsel, in which there was an agreement between certain lumber dealers. It is not a parallel case by any means, although they do decide there that a penalty imposed for a violation of an agreement to sell only to certain parties, was illegal and in that case an injunction issued.

It was an action under their system of code pleading for damages which, having been ascertained, the court was asked to issue an injunction, and did issue an injunction. By a careful perusal of that case an attorney or judge would have no difficulty in distinguishing the difference between that and the present case.

The same question on the same kind of a contract came before the supreme court of Minnesota as was in the Indiana case and the holding was directly to the contrary (*Bohn Mfg. Co. v. Lumbermen's Ass'n*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. 319).

This decision in the supreme court of Indiana is opposed to our own court in its vital principles.

In a case that went up from myself, the Live Stock Exchange case, which was afterward affirmed by the supreme court (*People ex rel. v. Chicago Live Stock Exchange*, 143 Ill. 210), a bill was dismissed, which sought an injunction against the Live Stock Exchange. It had an association or union, by which they agreed that they would only sell to mem-

bers of the association and members of the association agreed they would only buy stock from members of the association. The packers became members of the association. So there you had the main point, an agreement that they would only buy and sell between themselves. Outsiders went into the stock yards with cattle and they could not find any purchasers, they got one bid and they had to be satisfied with that. Nobody else would buy. An association in the west, in Kansas, I believe, attempted by bill filed here to break up this arrangement in the stock yards here on the ground that it was in restraint of trade. I could find no reason why any body of men could not get together and agree that they would only sell to each other and buy from each other, notwithstanding that was a market overt, a public market. The freedom of contract, it appeared to me, demanded that agreements of that kind should be sustained; that freedom of contract was as important as freedom of trade.

The complainant in that case (143 Ill. 210) not being a member of the association, it was held, had no standing in a court of equity to attack it, notwithstanding it prevented competition, as he alleged, in bidding for his cattle. That is the only decision in this state which in my opinion has any bearing upon the case at bar.

The regulation of trade and commerce is not a judicial function by any means; it is an administrative or legislative function, and in order to prevent a restraint of trade, our state and our nation have made laws, anti-trust laws, punishing parties who combine in restraint of trade or to create a monopoly. A party to a contract may bring that contract before the court, and if it involves a question as to whether it is in restraint of trade or not, the court must pass upon it; but when he is not a party to the contract, the proper remedy, it appears to me, is through the officers of the state or nation, by way of criminal or other prosecution, or even by bill filed on behalf of the public to restrain violations of the anti-trust law, or operations or combinations in restraint of trade. He has no standing, in my opinion, to call upon a court of equity to interpose in his favor. The remedies imposed by the legis-

lature for violations of the anti-trust laws ought to be pursued, and where the matter is not the construction or the enforcement of a contract between the parties who appear in the court, a court of equity ought not to take jurisdiction.

It may be that there are exceptions to that general rule, which I think is a proper one—there may be exceptional cases. This is not one.

The court, in granting an application for temporary injunction, must always look upon what may be called the balance of equity or of damages. If I grant a temporary injunction in this case, it is a mandatory injunction, it is practically a command on these wholesale merchants to sell to this party. Some of them allege different reasons why they will not sell to him, but the main reason is the contract in question, though there are other reasons which some of them allege and which are personal. He denies all allegations such as trying to corrupt their employes as intimated by the affidavits, trying to see the shipping books, etc.

I know of no way in which a court of equity can make one man trade with another. If a party puts himself in a position where he holds himself out to the public as ready to sell to everybody on the same terms, it may be that an action at law will lie against the merchant for any damages that a party may sustain to whom he refuses to sell, but I see no method of proceeding in equity by which I can make that merchant sell to that individual unless he wants to. He may refuse to trade with him from mere caprice. A court of equity cannot undertake to supervise the entire wholesale drug trade in this city, and see that they sell to this man Platt or to anybody else goods when they are demanded. I cannot undertake to inquire into each case, and see whether there is foundation for the refusal; whether it is based on personal reasons or is based upon this particular contract. It is such a matter and requires such supervision that a court of equity will not undertake it, but prefers to leave the party to his remedy at law. The great injury that would result to the trade generally, to the large number of people engaged in this business—not only retail druggists, but wholesale druggists and the

manufacturers, is so large, so vast, that the private injury that this party may suffer by the failure to sell him goods, ought not to overbalance that great amount of damage which would be sustained by the issuing of an injunction.

An injunction of this kind is practically a decision of the merits of the case in favor of the complainant on the affidavits and on a motion for temporary injunction. A court with great reluctance issues a mandatory injunction in the first instance. As a rule, it refuses until the final hearing to issue any such injunction, in order that it may make no mistake as to the merits of the case or as to the equities of the parties.

The motion for injunction in this case will be denied.

NOTE.

The decision of Judge Tuley in this case has been cited with approval and followed by Judge Kohlman in *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606 (U. S. C. C. Ill. Jan. 19, 1906), and by Judge Cochran in *Hartman v. John D. Park & Sons Co.*, 145 Fed. 358, 386 (U. S. C. C. Ky. Feb. 14, 1906).

EXTENT OF THE RIGHT OF A MANUFACTURER TO CONTROL THE PRICE OF HIS PRODUCTS.

A. Proprietary medicine cases.

(1) The legality of the contracts by which manufacturers of proprietary medicines sell only to wholesale dealers under contracts binding them to sell only at a certain price and only to retail dealers who also agree only to sell at a certain price, or whose names are not on a list published by the manufacturers as retail dealers to whom the wholesalers shall not sell, has been upheld by the courts of various states. *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839; *Park & Sons Co. v. Nat. Wholesale Druggists' Ass'n*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; *Elliman v. Carrington* (1901), 2 Ch. 275, 84 L. T. (N. S.) 853; *Fowle v. Parks*, 131 U. S. 88; *Dr. Miles Medical Co. v. Goldthwaite*, 133 Fed. 794; *In re Park*, 138 Fed. 421; *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606 (1906); *Hartman v. Park*, 145 Fed. 358 (1906); *Wells & Richardson Co. v. Abraham*, 146 Fed. 190 (1906); *Hartman v. Hughes* (U. S. C. C. Minn., Judge Lochren, July 14, 1905); *Platt v. Nat. Retail Druggists' Ass'n* (decision of Judge Tuley, *supra*); *Dr. Miles Medical Co. v. May* (Ct. Com. Stegheny Co., Pa., Judge McFarland, March, 1906). And these

contracts have been held not to be in restraint of trade. *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Park & Sons Co. v. Nat. Wholesale Druggists*, 175 N. Y. 1, 67 N. E. 136; *Hartman v. John D. Park & Sons Co.*, 145 Fed. 358.

In *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174, there was an action on contract to recover liquidated damages for breach of an agreement not to sell Phenyo-Caffein below a stipulated price. At the time of the sale, and as part of it, a written agreement was read to the defendant and delivered to him, one condition of which provided that the acceptance of the goods with the notice of the conditions of the sale should be an assent to the terms. The defendant accepted the goods, expressed no dissent and sold the goods so purchased below the stipulated price. It was held that the defendant was bound by the terms of the contract not to sell below the stipulated price, and that he was liable for the amount of the liquidated damages.

In *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839, the defendant procured a retail druggist to purchase Phenyo-Caffein from the plaintiff under contracts restricting the retail price. The druggist turned over the medicine to the defendant at the purchase price and he then sold the medicine at cut prices. An injunction was held proper to restrain defendant from selling at less than the specified price. In the course of the opinion in the case Judge Knowlton says: "The plaintiff being the owner and manufacturer of a proprietary medicine known as 'Phenyo-Caffein,' sold it to purchasers only under contracts in which they agreed not to sell it at retail at less than a specified price, and he undertook to stipulate that purchasers from his purchasers should obtain and sell it only under such an agreement. His right to secure such advantages to himself, so far as possible, by contracts in proper form, is not now questioned."

In *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, an injunction was sought to prevent a purchaser from selling Phenyo-Caffein at "cut" rates. The defendant purchased the medicine from one who was under a contract not to sell at less than a stipulated price. It was held that the injunction could not be granted to prevent a purchaser from one who did sell at the stipulated price selling the medicine at less than the stipulated rates, there being no privity of contract between the ultimate purchaser and the manufacturer.

In *John D. Park & Sons Co. v. Nat. Wholesale Druggists' Ass'n*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. 578 (1903), there was an action to recover damages for alleged injuries to plaintiff's business through a conspiracy on the part of the defendants. The court held that a plan by a voluntary association of dealers engaged in selling proprietary medicines, adopted by the manufactur-

ers of these medicines, in order to maintain stability of prices by which the manufacturers would sell at fixed prices, with a rebate only to concerns that maintained the selling price, is not void as creating a monopoly in restraint of trade or as against public policy, and that a merchant cannot complain if others, by representation and persuasion, induce the manufacturers to establish a uniform price for fixed quantities of goods.

In *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606 (1906), upon exceptions to the answers to a bill for injunction, it was held that the system of selling medicines on the serial number plan and fixing the retail price of the same was valid, and that while the defendant might lawfully buy these medicines from retail druggists at the prices fixed between them and the manufacturers or general wholesale agents and sell them at will for such prices as he might make, still he could be enjoined from obtaining these medicines by inducing wholesalers or retailers to violate their contracts with the manufacturers.

In *Hartman v. Park*, 145 Fed. 358 (1906), an injunction was granted to restrain the defendant, a wholesale druggist, from obtaining "Peruna" by false representations from wholesalers and retailers who have contracted to sell Peruna only at a designated price, and from reselling it to retailers operating "cut rate drug stores," who in turn sell it to customers at less than the fixed retail prices, the serial numbers stamped on the labels and wrappers being removed so as to avoid detection. It was held that the manufacturer had the right to sell his medicine to the wholesaler and at the same time retain a control over the subsequent trade therein as to the retailers to whom and as to the prices at which the wholesalers may resell, and as to the prices at which the retailers may sell to the consumers.

In *Wells, Richardson & Co. v. Abraham*, 146 Fed. 190 (1906), it appeared that complainant was the manufacturer of "Paine's Celery Compound," which it sold under a trade-mark and in packages containing serial numbers thereon, and only to wholesale dealers under contracts binding them to sell only at a certain price, and only to retail dealers who also had contracts with complainant fixing the price at which the medicine should be sold to consumers. It was held that such contracts were legal and that complainant was entitled to an injunction restraining the defendants from inducing any purchaser who had made such a contract to violate the same by selling to defendants or from knowingly purchasing from any such person in violation of his contract, and from selling the medicine to consumers after the cartons and labels containing the directions for its use and the serial numbers by which the purchasers were traced had been removed.

In *Dr. Miles Medical Co. v. Goldthwaite*, 133 Fed. 794, the de-

fendant was restrained from interfering with such contracts, by inducing their violation by the parties thereto, and from selling the medicines of complainants in other than the original packages and at the contract price.

In *Elliman v. Carrington* (1901) 2 Ch. 275, contracts were held valid by which Carrington & Son, who sold at wholesale, bought from Elliman Sons & Co. "Elliman's Embrocation," agreeing that they would not sell it below certain prices, and that when they sold to others they would procure from those others an agreement not to sell below certain prices. The court held that the Ellimans had the right to fix the price not only at which they would sell to Carrington, but also the price at which Carrington should resell the same.

In *Dr. Miles Medical Co v. May Drug Store* (Court of Common Pleas, Allegheny Co., Pennsylvania, No. 610, March term, 1905), Judge MacFarland held that these contracts were valid and not in restraint of trade, but that a court of equity would not grant an injunction to complainant to restrain the defendant from inducing purchasers from the complainant to violate their contracts and sell the complainant's remedies to defendant, who then sold them to consumers at less than the retail price, on the ground that complainant did not come into a court of equity with "clean hands" on account of its misrepresentations as to the powers and remediable qualities of its preparations, "Dr. Miles' Nervine" and "Heart Cure."

(2) Where, however, a dealer purchases proprietary medicines from a retail dealer who has a right to sell to the consumer at the contract price, and such dealer subsequently resells the medicines thus purchased at less than the fixed retail price, it seems that the manufacturer cannot complain. The contracts contemplate sales by retailers which shall pass an absolute title to the property. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606; *Wells, Richardson Co. v. Abraham*, 146 Fed. 190, 196. This rule has been held applicable to other forms of similar contracts:

(a) As to books. *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15 (C. C. A., June, 1906), affirming 139 Fed. 155; *Scribner v. Straus*, 147 Fed. 28 (C. C. A., June, 1906), affirming 139 Fed. 193; *Harrison v. Maynard-Merrill Co.*, 61 Fed. 689, 10 C. C. A. 17; *Publishing Co. v. Smythe*, 27 Fed. 914. *Contra, Authors', etc. Ass'n v. O' Gorman Co.*, 147 Fed. 616.

(b) As to tobacco. In *Taddy & Co. v. Sterious & Co.* (1904) 1 Ch. 354, 20 T. L. R. 102, 89 L. T. R. 628, tobacco was sold in boxes, and the following notice was printed on the box: "All of the above packet tobacco and cigarettes are sold by Taddy & Co. upon the express condition that retail dealers do not sell the packet tobacco or cigarettes below the prices set forth. Acceptance of the goods will be deemed

a contract between the purchaser and Taddy & Co. that he will observe these stipulations." The court there said that "conditions of this kind did not run with the goods and could not be imposed upon them. Subsequent purchasers, therefore, did not take the goods subject to any conditions which the court could enforce."

(c) As to watches. *Ingersoll v. Snellenberg*, 147 Fed. 522 (October, 1906).

(3) *Restraint of trade.* (a) These proprietary medicine contracts by which the retail price is sought to be controlled have in several cases been held not to be in restraint of trade. *Park & Sons Co. v. Nat. Wholesale Druggists*, 175 N. Y. 1, 67 N. E. 136; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Hartman v. Park & Sons Co.*, 145 Fed. 358; *Elliman v. Carrington* (1901) 2 Ch. 275; *Dr. Miles Medical Co. v. May Drug Co.* (Allegheny Co., Pa., Com. Pl.) *supra*; *Platt v. Retail Druggists' Ass'n*, 1 Ill. C. C. 1.

(b) But actions for damages have been sustained under the Sherman Act of 1890, arising out of this system of contracts.

In *Loder v. Jayne*, 142 Fed. 1010, where it appeared that three voluntary associations, composed of the manufacturers, wholesalers and retailers, respectively, of drugs, proprietary medicines, etc., were organized to arbitrarily fix a minimum retail price for such articles, and then restricted the sale of such articles to such retailers only as conducted their retail business in accordance with the arbitrary standard of prices, it was held that such combination was in restraint of interstate commerce in the drug trade so far as it excluded "aggressive cutters" of prices and those who dealt with them, and was in violation of the Act of Congress, July 2, 1890, prohibiting monopolies in restraint of interstate trade and commerce, and treble damages to the amount of \$32,641.50 were recovered by the plaintiff.

In *Klingel's Pharmacy v. Sharp & Dohme*, 64 Atl. 1029 (Md., Nov. 2, 1906), it was held that where an association of retail druggists in a certain city and wholesale druggists formed a combination to maintain a maximum schedule of prices, and in pursuance of a plan refused to sell to plaintiff, a retailer, who had refused to join the combination, and coerced and intimidated vendors of like commodities by means of threats to blacklist and boycott such vendors if they sold to plaintiff, whereby such vendors were deterred from selling to plaintiff, the parties to the combination were liable to plaintiff for resulting damages to his business.

B. Patents.

The principle is now well recognized that a patentee or his assignee has the right to impose restrictions upon the future sale or use of a patented article, and may fix the price at which the patented article or product shall be marketed. *Bement v. Nat. Harrow Co.*,

186 U. S. 70, 92; *Heaton-Peninsular Button Co. v. Eureka Specialty Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; *Indiana Mfg. Co. v. Case Threshing Machine Co.*, 148 Fed. 21; *Ingersoll v. Snellenberg*, 147 Fed. 522; *Nat. Phonograph Co. v. Schlegel*, 128 Fed. 733; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424; *Edison Phonograph Co. v. Pike*, 116 Fed. 863; *Edison Phonograph Co. v. Kaufman*, 105 Fed. 960; *Consolidated Seeded Raisin Co. v. Griffin*, 126 Fed. 364; *Cortelyou v. Lowe*, 111 Fed. 1005, 49 C. C. A. 671; *Dickerson v. Tinling*, 84 Fed. 192, 28 C. C. A. 139; *Dickerson v. Matheson*, 57 Fed. 524; *Bonsack Machine Co. v. Smith*, 70 Fed. 383; *Cortelyou v. Johnson*, 138 Fed. 110; *Bowling v. Taylor*, 40 Fed. 404; *Hulse v. Machine Co.*, 65 Fed. 864; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005; *Standard Fireproofing Co. v. St. Louis Co.*, 177 Mo. 559, 76 S. W. 1008; *Morse Twist Drill Machine Co. v. Morse*, 103 Mass. 73; *Bancroft v. Union Co.*, 57 Atl. 97 (N. H. 1903).

C. Copyright cases.

In several cases the right of the owner of copyrighted publications to control the future trade and price therein has been before the courts. *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15, affirming 139 Fed. 155; *Scribner v. Straus*, 147 Fed. 28, affirming 139 Fed. 193; *Mines v. Scribner*, 147 Fed. 927; *Authors & Newspapers' Ass'n v. O'Gorman Co.*, 147 Fed. 616; *Straus v. Am. Pub. Ass'n*, 177 N. Y. 473, 69 N. E. 1107; *Doan v. American Book Co.*, 105 Fed. 772, 45 C. C. A. 42; *Heath v. American Book Co.*, 97 Fed. 533; *Harrison v. Maynard, Merrill & Co.*, 61 Fed. 689, 10 C. C. A. 17; *Publishing Co. v. Smythe*, 27 Fed. 914; *Murphy v. Christian Press Ass'n Pub. Co.*, 38 App. Div. 426, 56 N. Y. Supp. 597.

D. Miscellaneous general cases.

In other cases contracts have been presented by which in various forms the manufacturers sought to control the trade and retail prices of their products. *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91 (Dwight's Cow Brand Saleratus and Soda); *Commonwealth v. Grinstead*, 23 Ky. L. Rep. 590, 63 S. W. 427 (groceries); *Wieboldt v. Standard Fashion Co.*, 80 Ill. App. 67 (patterns); *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454 (tobacco); *Re Greene*, 52 Fed. 104 (whiskey); *Olmstead v. Distilling & Cattle Feeding Co.*, 77 Fed. 265; *Pasteur Vaccine Co. v. Burkey* (Tex.) 54 S. W. 804.

(Superior Court of Cook County. In Chancery.)

Fannie B. Hayden

vs.

Margaret Kelly.

(October, 1902.)

1. **MANDATORY INJUNCTION TO COMPEL PERFORMANCE OF PERSONAL SERVICES.** A court of equity will not by its writ of injunction, compel the performance of purely personal services. Thus where a person leases a boarding house, in consideration of the making of a monthly payment of \$200 in cash, and \$25 a month in board and lodging to be furnished to the lessor, and the lessee refuses to furnish such board and threatens to eject the lessor from the premises, the court cannot interfere by injunction, as there is a complete and adequate remedy at law.
2. **SAME—REMEDY—DAMAGES.** In such a case the lessor would be entitled to recover as damages the amount stipulated in the lease as to the value of the board, viz: \$25 a month.

Bill for injunction. Preliminary injunction granted.
Motion to dissolve. Heard before Judge Jesse Holdom.

For statement of facts see opinion.

Meek, Meek, Cochrane & Munsell, for complainant.

Edwin Terwilliger, Jr., for defendant.

HOLDOM, J.:—

Complainant leased from February 1, 1900, to April 30, 1903, certain premises to defendant, which theretofore and since have been and still are used and operated as a boarding house at a monthly rental of \$225, payable, \$200 in cash, and board and room to be furnished complainant to the extent of \$25 per month.

It appears from the evidence that differences and disputes arose between complainant and the defendant, engendering quarrels and high words, which culminated in one instance in a personal physical combat between them. Contrary to the agreement in the lease and consequent upon these disagreements and quarrels, defendant has threatened to eject the complainant from the room occupied by her in the demised

premises and to refuse to furnish her any more board, to prevent the carrying out and execution of which threat the power of this court and its protecting arm of injunction is invoked by complainant. As a further reason for the intervention of the court the insolvency of defendant is alleged, as well as resulting irreparable injury to complainant.

The facts not being materially disputed the issue resolves itself into one of law.

Can a court of equity by its writ of injunction compel the performance of personal service, such as furnishing and providing nutriment from day to day and at appropriate, seasonable and reasonable times of the day, and if it could, would the duty devolve upon the court of furnishing a menu designating the food to be furnished, with the hours of service, and whether or not, according to the French, German, English, Italian, American or other methods of cooking, in order to steer the defendant clear from an unintentional violation of the court's protecting process? A contemplation of the attitude in which the court would be placed in the assumption of such a task is self-refuting of its power or duty to attempt the experiment of granting such relief.

While the scope of the writ of injunction in these modern times is constantly enlarging, and it is carried into new and sometimes novel fields of activity, yet it has its limitations.

It is well-settled law that a court of equity will not, by its writ of injunction, compel a service which is purely and solely personal, nor by such a writ mandatorily command a personal service to be performed; parties thus situated must be left to their remedy in an action for damages at law. 22 Am. & Eng. Enc. of Law, 1002; *Chicago Municipal Gas Co. v. Town of Lake*, 130 Ill. 42; *Welty v. Jacobs*, 64 Ill. App. 285; *Grape C. C. Co. v. Spellman*, 39 Ill. App. 630; *O'Brien v. Perry*, 130 Cal. 526; *Ikerd v. Beavers*, 106 Ind. 483.

Quotation of authorities to support this contention might be cited in endless array; those quoted, however, are amply sufficient to demonstrate the uniformity of the application of the legal principle here involved.

Has complainant an ample remedy at law? The covenant

of the lease itself is an affirmative answer to the question. The rent reserved is \$225 per month, "payable in monthly installments of two hundred dollars in cash *and board and room to be given to Fannie B. Hayden*" (complainant) "to the extent of twenty-five dollars per month during this lease."

The right of complainant to "board and room" is limited to \$25 per month, no more and no less; that is the covenant, and a failure to perform it on the part of the defendant can be acquitted by the payment of \$25 per month; that would be the measure of damages; that is the agreement of the parties made in the contract. It is true some household furniture is let with the house, but under no condition of the lease would complainant have the right to interfere with the tenant's undisturbed possession and use of the same during the term of the lease and for any damage thereto beyond that of ordinary wear and tear, or destruction or loss of any part thereof, complainant at the expiration of the term will find a remedy in a suit at law. It therefore follows that the temporary injunction heretofore granted must be dissolved and the bill dismissed for want of equity at the cost of complainant.

(Circuit Court of Cook County. In Chancery.)

Truman A. Taylor

vs.

The Pullman Company.

(January 6, 1902.)

1. **INJUNCTION—DISMISSAL OF BILL—AMENDMENT.** If the court is of opinion that the bill, where the sole relief sought is injunction, does not make out a case entitling the party to an injunction, and that it is incapable of amendment so as to entitle the party to the relief sought, the court will, upon motion of either party, dismiss the bill for want of equity.
2. **SUPPLEMENTAL BILL—EFFECT OF.** A motion for leave to file a supplemental bill, and for a temporary injunction, is a waiver of

a prior motion for a temporary injunction, and takes the place thereof.

3. **PRACTICE—RENEWAL OF MOTION FOR INJUNCTION.** Where a motion for an injunction, or to dissolve one, is passed upon by one branch of the court, it is an improper practice to renew such motion based upon the same identical pleadings and evidence, before another branch of the court.
4. **SUPPLEMENTAL BILL AFTER DENIAL OF ORIGINAL APPLICATION FOR INJUNCTION.** If after the decision of the original motion for an injunction new facts arise concerning the matter in dispute, the party has a right to renew his motion for an injunction and base the same upon the pre-existing facts and pleadings in the cause and upon the new matters which are set forth in the supplemental bill.
5. **MOTIVE OF COMPLAINANT IN FILING BILL FOR INJUNCTION.** Upon a motion for a temporary injunction by a stockholder of a corporation to enjoin it from purchasing the property of another corporation—the issuance of which is largely a matter of discretion of the chancellor—the court would cease to be a court of equity and conscience if it did not take into consideration the motive of the complainant, or the real party in interest in instituting the suit (see note at end of case).
6. **INJUNCTION NOT GRANTED FOR IMPROPER PURPOSES.** The writ of injunction is the strong arm of the court, but it is wielded and controlled by the conscience and discretion of the chancellor, and its use for improper or unlawful purposes will not be permitted.
7. **QUASI-ESTOPPEL IN EQUITY—LACHES.** Where complainant in December, 1899, filed his bill for a temporary injunction to restrain the Pullman Company from purchasing the Wagner Company and the motion was denied, and thereafter the Wagner Company was dissolved, and there were large transactions in the sales of the stock of the company, and the complainant stood by and witnessed the stock of the Pullman Company issued for the purchase of the assets of the Wagner Company, traded in publicly for more than a year without further making any move in his suit, he has slept upon his rights, by failing to prosecute his suit, until there has arisen a *quasi-estoppel* against obtaining relief by injunction, if he was ever entitled to any.
8. **LIS PENDENS TO PURCHASERS OF CORPORATE STOCK.** Where the complainant has not prosecuted his suit in good faith with all reasonable diligence and without unnecessary delay, purchasers of the stock of the Pullman Company issued while this suit for a temporary injunction was pending cannot be held to have

taken the stock with constructive notice of the pendency of the suit and subject to future proceedings therein.

9. **PARTIES—LACK OF NECESSARY PARTIES.** The holders of the twenty million dollars of stock of the Pullman Company issued during the pendency of this suit are necessary parties to the supplemental bill proposed to be filed and for a lack of such parties the motion for a temporary injunction must be denied.
10. **ULTRA VIRES—PULLMAN COMPANY—POWER TO PURCHASE ASSETS OF WAGNER COMPANY ENGAGED IN SAME BUSINESS.** Under its charter the Pullman Company had power to purchase railway cars without limitation as to number or as to the party from whom the purchases may be made, and also all the powers, privileges, rights, etc., incident to such corporations and necessary or useful for the purposes of the corporation. *Held* that the Pullman Company immediately upon its organization could have made a purchase of the assets of the Wagner Company engaged in like business, "as incident to, necessary and useful" to it in the commencement of its business, and having such power at the start of its business it could make such purchase at any time thereafter that it was considered necessary or useful in carrying on the business of the corporation; and whether such purchase would be necessary or useful was for the board of directors to determine; and while such purchase might be an abuse of the charter power it was not an *ultra vires* act.
11. **DIRECTORS, LIABILITY OF, FOR MISTAKE AS TO VALUATION.** An honest mistake of directors as to values gives neither the state nor any stockholder a ground of action.
12. **POWER TO PURCHASE CARS, RIGHTS OF CORPORATION UNDER.** The power to purchase cars and lease the same to railroad companies confers power to purchase cars which are already leased to railroad companies.
13. **ULTRA VIRES ACTS—STOCKHOLDER OF ONE CORPORATION CANNOT COMPLAIN OF ULTRA VIRES ACTS OF ANOTHER CORPORATION.** A stockholder in one corporation has no footing in a court of equity to enforce purely public, or redress purely private rights as to or in connection with alleged *ultra vires* acts of another corporation. That is left to the people of the state under which the corporation had its charter, or to the stockholders or creditors having an interest.
14. **ULTRA VIRES ACTS—RIGHT OF STOCKHOLDER TO QUESTION.** A stockholder has a standing to question the *ultra vires* acts of his own corporation by which he may be injured because of the trust relation existing between him and the corporation.
15. **POWER OF CORPORATIONS AND JOINT STOCK ASSOCIATIONS ENGAGED IN A BUSINESS AFFECTED WITH A PUBLIC INTEREST, TO DISSOLVE.**

A corporation chartered to carry on a business affected with a public interest is under an obligation or duty to carry on such business during the life of its charter, and not to discontinue its business and dissolve, except with the consent of the state, but a joint stock association (such as the Wagner Joint Stock Association) organized under a law expressly providing that such associations may be dissolved in pursuance of its articles of association, whose articles provide for a dissolution upon sixty days' notice given, can dissolve itself because there is a limit to the implied obligation to continue in business, granted by the state, to the effect that it should serve the state until it choose to dissolve itself in pursuance of its articles of association; nor under such a provision is there any implied obligation not to dissolve for the purpose of selling its property, or for the purpose of enabling its shareholders to sell their interest in such property, for cash or for the stock of some other corporation.

16. **RAILROADS—DUTY TO FURNISH FACILITIES.** A railroad company is under an obligation to furnish transportation to the public and to furnish all known appliances. It may construct its own cars and operate the same if it desires, or it may lease cars and contract for service to be rendered in connection with the running thereof, with any person or corporation it sees fit.
17. **PURCHASE OF PROPERTY OF COMPETITOR BY PULLMAN COMPANY NOT VIOLATION OF ANTI-TRUST LAWS.** While the purchase of the Wagner Company by the Pullman Company may have removed the latter's chief competitor, yet the right to contract in that respect as to service by sleeping and dining cars with railroad companies is open to all. The purchase or combination of the Pullman Company with the stock and property of the Wagner Company did not necessarily give the Pullman Company the power to raise prices or prevent competition in the business of contracting with railway companies for the use of sleeping cars and furnishing accommodations connected therewith, and such purchase is not a violation of the anti-trust acts of Illinois, or of the United States act against restraint of trade and monopolies.
18. **MONOPOLIES AND COMBINATIONS, WHEN ILLEGAL.** It is not every combination that is prohibited by the anti-trust laws, or that is opposed to public policy. It is not sufficient to create an illegal monopoly, that the transaction challenged may tend to restrain competition or tend to create a monopoly. The transaction complained of must necessarily put the purchaser in the position where he can, if he desires, create a monopoly.
19. **PUBLIC POLICY DEFINED.** By public policy is intended that principle of law which holds that no subject can lawfully do that

which has a tendency to be injurious to the public, or against the public good, which may be termed a policy of the law or public policy in the administration of the law.

20. **COURTS CANNOT DECLARE THAT AGAINST PUBLIC POLICY WHICH THE STATE PERMITS TO BE DONE.** The courts cannot permit that to be declared against public policy which the state permits to be done. To permit the courts to declare that to be illegal and void which is authorized by the legislature of the state, would be to substitute the courts for the legislature.
21. **PUBLIC POLICY OF ILLINOIS AS TO MONOPOLIES.** From a review of the anti-trust statutes of Illinois and of the acts passed by the legislature in 1897 it would seem that the public policy of the state of opposition to combinations and monopolies in Illinois has changed to a policy favoring combinations and monopolies.
22. **COMBINATIONS AND MONOPOLIES—CONSTRUCTION OF LAWS REGULATING.** The laws of trade appear to be almost as irresistible as the laws of nature. These combinations are the evolution of trade and appear to be demanded by the present economic conditions. Such laws as the legislature deem it necessary to enact in that regard should be strictly construed and enforced in favor of the public; but the constitutional right to own property and contract with reference thereto, should not be infringed or abridged except in a case where it is made clearly to appear that unless there is such interference, the public will be injuriously affected. *Held* this is not such a case.
23. Complainant, the owner of but little more than the one-hundredth part of one per cent. of the capital stock of the Pullman Company, an Illinois corporation, filed his bill on Dec. 28, 1899, for an injunction against the defendant, to enjoin it from carrying out an intended purchase of all the property of the Wagner Palace Car Company, a joint stock corporation organized under the laws of New York, and from delivering 200,000 shares (\$100 each) of the capital stock of the Pullman Company as the purchase price proposed to be paid for said property. December 30, 1899, was fixed as the day for the completion of the sale. Complainant purchased his stock (100 shares) about one month before and after the call for the meeting of stockholders of the Pullman Company, on December 5, 1899, called to ratify the purchase. The motion for the injunction was heard on December 30, 1899, and denied. Thereafter the purchase was consummated, the Wagner Company dissolved, and stock of the Pullman Company issued in payment for the assets of the former. In May, 1901, a motion was made by complainant for leave to file a supplemental bill and for a

temporary injunction based upon the original bill, affidavits and answer. *Held*, that complainant is not entitled to an injunction or to any equitable relief and complainant's bill is dismissed for want of equity.

Motion for leave to file supplemental bill and for temporary injunction based upon the original bill and answer, the affidavits and documentary proof filed in support of such bill and answer, and also upon the supplemental bill proposed to be filed and other affidavits and other documentary proof submitted by the respective parties. Heard before Judge Murray F. Tuley.

The facts are stated in the opinion of the court.

Gregory, Poppenhusen & McNab, solicitors for complainant.

Isham, Lincoln & Beale, solicitors for defendant.

TULEY, J.:—

This is a bill filed by Truman A. Taylor as a stockholder against Pullman's Palace Car Company on the 28th of December, 1899, praying for an injunction against the defendant, an Illinois corporation, from carrying out an intended purchase of all the property of the Wagner Palace Car Company, a joint stock corporation organized under the laws of the state of New York, and from delivering to the Wagner Company, or to anyone for it, 200,000 shares (\$100.00 each), of the capital stock of the Pullman Company, as the purchase price proposed to be paid for said property.

Some time prior to the 8th of November, 1899, the two companies entered into an informal agreement concerning the sale of the property and assets of the Wagner Company to the Pullman's Palace Car Company, which contemplated the making subsequently of a formal agreement between the parties, and on said 8th day of November said formal agreement was entered into by them, which recited, in substance, that the directors of the Wagner Company had taken appropriate action to secure the dissolution of such company, on the 30th of December, 1899, and that in consideration of the premises and of the covenants and agreements contained in such agreement, the Wagner company was to sell, assign, con-

vey and transfer to the Pullman Company all its cars, equipment, real estate, plant, good will, assets and property, including its contracts with railroad companies for the renting of its sleeping and other cars.

In consideration of such sale, etc., the Pullman Company was to cause its capital stock to be increased 200,000 shares, the par value of which was \$20,000,000, which shares were to be issued and delivered to the Wagner Company, or to its liquidating trustees, in payment of the Wagner property, said shares to be distributed by the Wagner Company, or the trustees, to the shareholders of said company; the Wagner Company binding itself to make no new contracts and to preserve the *statu quo* of its property, as near as might be, until the 30th of December, next thereafter, when it was to be delivered to the Pullman's Palace Car Company; the Pullman Company to assume all the indebtedness and liability of the Wagner Company. The agreement was to be subject to the ratification of the stockholders of the respective companies.

Due notice was given by the Wagner Company of the said agreement, and that the directors found it necessary, in connection with the execution of the agreement, to dissolve the joint stock association and that unless a majority of the shareholders should oppose such dissolution, it would be dissolved on the 30th of December, 1899; and that the shareholders could take either cash at \$180 per share for their Wagner holdings, or an equal number of shares of stock of the Pullman Company, as they might desire.

Due notice was given of the execution of the contract to stockholders of the Pullman's Palace Car Company and of a meeting of said stockholders to be held on December 5, 1899, to vote for the ratification of the same, and to vote upon the issuing the twenty million dollars additional stock to pay for the property to be purchased; also to vote upon the question of change of the name "Pullman's Palace Car Company" to "The Pullman Company," and as to increasing the number of directors to not less than eleven.

Only one of the shareholders of the Wagner Company made

objection to the carrying out of the agreement, towit, one Francis, who, it is alleged, was an employe and acting in the interests of the same party, who, it is contended, is the real complainant in this case. Francis applied for an injunction against the Wagner Company in the New York courts, was defeated, and his bill has since been dismissed.¹

The complainant herein owning one hundred shares appeared at the meeting of the stockholders of the Pullman's Palace Car Company, and made formal objection to the ratification of the agreement to the increase of the stock, the change of name, and increase of directors, and was the only objecting stockholder. He purchased his said stock nearly a month after the call for said meeting was made public and—it is a fair inference from the evidence—with a view to the litigation.

The 30th of December, 1899, was fixed upon for the consummation of the purchase by the formal transfer of the property and assets of the Wagner Company in exchange for the 200,000 shares of stock of the Pullman Company. The Wagner Company was formally dissolved upon that day, the 30th of December, and its property placed in the hands of liquidating trustees.

On the 28th of December, 1899, the original bill was filed in this case, seeking to enjoin the consummation of the proposed purchase.

On the 29th of December, the Pullman Company filed its answer therein, and on the next day, the 30th, the motion of complainant for a temporary injunction to stay all proceedings to consummate said purchase, was heard upon the pleadings, affidavits and documentary evidence filed in said cause.

The original bill alleges, among other things, that the proposed purchase was for the purpose of enabling the Pullman Company to control the sleeping and parlor car business done upon the various railroads in Illinois and throughout the territory of the United States, and that the transaction, if consummated, would create a trust and monopoly controlled by

¹ *Francis v. Taylor*, 31 Misc. 187, 65 N. Y. Supp. 28; *aff'd* 52 App. Div. 631 (m), 65 N. Y. Supp. 1133.—Ed.

the Pullman Company, of such business operated on such railroads, and that the purchase is in direct violation of the laws and statutes of the state of Illinois, and opposed to public policy; and that its purpose was to enable the Pullman Company to swallow up and absorb its only other substantial competitor in the sleeping and parlor car business, and thereby obtain a monopoly.

The answer of defendant, while admitting some of the material allegations of the bill, denied that the Wagner Company had no right to dispose of its property and assets, and that the Pullman Company had no right to buy the same, or that the purchase was in violation of the anti-trust statutes of Illinois, or opposed to public policy; denies that the two companies were competitors in the sleeping and parlor car business, or that the object of the purchase was to enable defendant to control said business upon the railroads of the United States, and averred that the control of such business was and is in the said railroad lines, respectively, and that the sole object of the purchase and sale was the lawful and legitimate enlargement of the business of the Pullman Company; denies that it was part of the agreement between the companies that the Wagner Company should dissolve; denies any intent to establish a monopoly in said business, and avers that it is impossible that any monopoly could be established by means of such purchase, or by the action of said companies alone.

It also avers that the Chicago, Milwaukee and St. Paul Railway Company operates (as every railway company can, if it wishes), its own sleeping cars over its own railroad of over six thousand miles; that there were at the time of said purchase at least ten large car building establishments in the United States, customarily building sleeping and parlor cars, and selling them to railroad companies operating their own sleeping cars, of which said railroads there were seventeen in the United States.

Avers that the only competition possible is open to any concern or individual that may enter the field and compete for the leasing of cars to railroads, and for performing the work necessary for sleeping and parlor car operation.

On the said 30th of December, 1899, Judge Tuthill, one of the judges of this court, before whom said motion for temporary injunction was made, after argument, denied the motion.

In May, 1901, a motion was made in this cause for leave to file a supplemental bill and for a temporary injunction based upon said original bill and answer, the affidavits and documentary proof filed in support of such bill and answer; and also upon the supplemental bill which was proposed to be filed, and other affidavits and other documentary proof submitted by the respective parties to this controversy.

Some questions of practice are involved which make it necessary to review to some extent the prior proceedings.

Between the date of the order refusing the temporary injunction to-wit, the 30th of December, 1899, and March 16, 1901, except the entering of an order substituting solicitors for complainant, nothing whatever has been done in the case. On said last mentioned date a motion was made by the complainant for an order upon defendant to permit the inspection of the books of the Pullman Company, and at the same time a cross motion was made by the defendant to dismiss the original bill.

The sole object of the original bill was for an injunction against the defendant consummating the agreement of purchase entered into with the Wagner Company and delivering any shares of stock in payment therefor.

Judge Tuthill's opinion is before me, in which it is clear that he passed upon the merits of the bill—but independent of that opinion—in any case, where the sole relief sought is injunction, if the court is of the opinion that the bill does not make out a case entitling the party to an injunction, and that it is incapable of amendment so as to entitle the party to the relief sought, the court will, upon motion of either party, dismiss the bill for want of equity.

The defendant, more than a year after the decision of the motion for temporary injunction, moved to enter an order dismissing the bill on the ground that the decision of Judge Tuthill was practically a disposition of the entire case.

It is unnecessary to pass upon the motion of defendant,

because a new motion was made by complainant for an injunction based upon the original pleadings and evidence and upon the other matters set forth in a supplemental bill, and that motion made the 15th of May last should, in my opinion, take precedence over the motion of defendant to dismiss the original bill.

The complainant's motion May 15, 1901, for leave to file his supplemental bill and for a temporary injunction, was a waiver of his prior motion for a temporary injunction, and takes the place thereof. Where a motion for an injunction, or to dissolve one, is passed upon by one branch of the court, it is an improper practice to renew such motion based upon the same identical pleadings and evidence before another branch of the court.

If, after the decision of such original motion, new facts arise concerning the matter in dispute, the party has a right to renew his motion for an injunction and base the same upon the preexisting facts and pleadings in the cause and upon the new matters which must be set forth in a supplemental bill. The defendant, if such motion should be denied, could renew the motion to dismiss the bill for want of equity.

It must be admitted that the situation of the parties to this controversy had materially changed in the year and one quarter which had elapsed between the refusal by Judge Tuthill of the complainant's motion for an injunction and the making of this present motion. The original motion for an injunction was based upon an executory contract, which was about to be carried into execution, but the present motion is for an injunction upon executed contract; the same contract, but fully executed by both parties, since the denial of the original motion.

In the numerous affidavits filed in this case are found affidavits tending to show that the complainant is not the real party in interest in this litigation. The complainant contends that the court cannot, upon this motion, or in this litigation, inquire into that question, but has filed no affidavits in reply to defendant's affidavits upon that point. The affidavits filed on behalf of defendant tend to show that the complainant is

not the real party in interest in this litigation, but that he is acting at the instigation of a gentleman, a resident of Boston, Massachusetts, who instituted, in a court in New York City, suit for an injunction in the name of one Francis (a clerk in his office), as a stockholder, against the Wagner Company carrying out the transaction in question. It appears that the New York suit failed, and that said stockholder, Francis, has since acquiesced in this purchase and sale to the extent of withdrawing all opposition to it. It must be admitted that the affidavits filed make a *prima facie* case against the complainant as to this contention—that complainant is not the real party in interest; that this suit is not prosecuted in good faith, but is an attempt to force the defendant to buy the shares standing in complainant's name at an exorbitant price, and is a mere speculative bill in equity. The complainant insists that even if defendant's contention is true, such fact cannot deprive the party holding the legal title (that is, the complainant herein) of the right of applying to a court of equity for the enforcement of his rights as a stockholder; that no matter what complainant's motive may be (whether it be to gratify his own malice, or to "sandbag"—as is alleged—the defendant company, or to allow others to do the same thing) he has a right to be heard as a stockholder of the Pullman Company.

Upon a motion for a temporary injunction—the issuance of which is largely a matter of discretion of the chancellor—the court would cease to be a court of equity and conscience if it did not take into consideration such a motive of the complainant, or of the real party in interest.

At common law a party could be indicted for prostituting the process of a court of justice to his own private or unlawful purposes, and punished therefor. Shall it be said that a party may use a court of equity, a court of conscience, for the accomplishment of improper or unlawful purposes, and actually accomplish such purposes by means of the strong arm of the court of conscience?

Our own supreme court have held that where there is a fraudulent combination of debtor and creditor to defraud

other creditors, the fact that they use a court of chancery—by means of a creditor's bill, receiver, and a sale by said receiver—to accomplish such purpose was as much a fraud as it would be to accomplish the same purpose by any other means; that such fraud, when proven, would vitiate the entire legal and equitable proceedings used in the accomplishment thereof. *Butler Paper Co. v. Robbins*, 151 Ill. 588.

There are some authorities to the effect that the motives of a stockholder in filing such a bill cannot be inquired into; that it is sufficient if he has the legal title to the stock, but whatever may be his rights as a stockholder, in a suit at law, when he comes into a court of equity, asking that the chancellor, in the exercise of a judicial discretion, shall give him the aid of the strong arm of the court to accomplish such an improper, illegal or criminal purpose, a different question is presented. The writ of injunction is the strong arm of the court, but it is wielded and controlled by the conscience and discretion of the chancellor, and its use for improper or unlawful purposes will not be permitted.

Another question that arises in this case, and is set up by the answer, is the question of the laches of the complainant in the prosecution of this suit. This presents the question whether there is not a *quasi*-estoppel upon complainant as to his remedy by injunction.

The original bill in this case did not make the Wagner Company a party defendant. It was not a necessary party defendant, but it could have been made a defendant as a proper party defendant. The failure of the complainant to make the Wagner Company a party defendant must be taken into consideration, because, as set forth in the supplemental bill, the Wagner Company has been dissolved, the contract between it and the Pullman Company has been consummated, all of the property, assets, etc., of the Wagner Company have been turned over to the Pullman Company, and the Pullman Company has issued to the Wagner Company, or to the trustees in liquidation, 200,000 shares of stock, purchase money therefor, which had been placed and sold for more than a year in open market.

During this delay this 200,000 shares of stock have been changing hands, but to what extent was not, and could not be shown.

At any time since December, 1899, the known or unknown holders of said stock could have been brought in as parties defendant, the unknown could have been made defendants as "the unknown holders or owners" of the stock.

The complainant contends that he was not guilty of laches in failing to bring in the holders of this twenty millions of stock, because, he alleges, they were represented by the Pullman Company when they became such holders, but this could not be if complainant's contention is true, to-wit: that the whole twenty millions of dollars issue of stock is void. If the stock is void, they never became stockholders; if it is valid, they are *bona fide* stockholders, and the whole foundation of complainant's suit is gone.

"There is a *quasi*-estoppel known to equity which does not cut off a party's title nor his remedy at law; it simply bars his right to equitable relief, and leaves him to his legal action alone. The equitable remedy to which this *quasi*-estoppel by acquiescence most frequently applies, is that of injunction, preliminary or final," etc. (See Pomeroy's Equity Jurisprudence, sec. 817).

It must be admitted that this doctrine has usually been applied to cases where one stands by and sees works which create a nuisance, erected, without making any protest, or to be operated for a length of time without his seeking the aid of an injunction, but the principle is applicable to this case, where the complainant has stood by and witnessed this stock put upon the market and traded in publicly for more than a year, without making any move in this suit to prevent it; has allowed his alleged rights as a stockholder to be infringed during all that time.

He has slept upon his rights by failing to prosecute this suit, until there has arisen a *quasi*-estoppel to his relief by injunction, if any he ever had.

The laches of complainant, in the prosecution of this suit, has been so gross that it might be held to justify a stockholder,

who had actual notice of the proceedings of the case, in believing that the complainant had abandoned his case or had, at least, abandoned his right, if any he had, to a remedy by injunction. *Norris v. Ile*, 152 Ill. 190.

The laches of complainant in the prosecution of this suit appears to be absolutely inexcusable. The attempted excuse that complications arose by reason of the change of solicitors, and that he did not know what his solicitors were doing in the case, is not worthy of consideration.

The complainant seeks to avoid the effect of his inexcusable laches by invoking the doctrine of *lis pendens*, contending that as this suit was pending against the Pullman Company when the twenty millions of stock was issued and placed upon the public market, the original parties to whom it was issued, and all persons buying the same on market overt, take with constructive notice of the pendency of the suit and subject to future proceedings therein.

The greatest of all writers upon Equity Jurisprudence, Pomeroy, in speaking of *lis pendens* as notice, says:

“The effect of the suit, as notice, continues through the entire time of its pendency, and ends with the final judgment. In order, however, that a purchaser *pendente lite* may be thus affected the suit must be prosecuted in good faith, with all reasonable diligence and without unnecessary delay.” (Pomeroy, sec. 634, *et seq.*, and cases therein cited). *Norris v. Ile*, 152 Ill. 190.

If the affidavits submitted by the defendant and not contradicted by complainant, upon the question of the good faith of complainant in the prosecution of this suit, are true, the “good faith” is woefully lacking and gives ground for the suspicion that the delay in the further prosecution of this suit was for the purpose of permitting greater complications to arise in order that the defendant might be forced to purchase the shares nominally represented by complainant, at a still more exorbitant price. The continued prosecution of the suit, “in good faith, with all reasonable diligence, and without unnecessary delay,” it must be admitted, is not shown by the evidence before the court.

A neglect to comply with these requisites "would relieve a purchaser from the effect of *lis pendens* as notice." (Pomeroy, sec. 435).

It follows from what I have already declared, that the holders of the twenty millions dollars of stock are necessarily parties to the supplemental bill proposed to be filed and that the motion for a temporary injunction must be denied.

Counsel for complainant has stated in his argument that if the court, upon the merits of the case, was of the opinion no permanent injunction could issue, he did not desire a temporary injunction.

The argument in this case has been as if it was on final hearing, and I am of the opinion that I should pass upon the merits of this case as shown by the affidavits and evidence produced upon these motions.

The first question is: Was the transaction in question, the alleged purchase by the Pullman Company of the cars, plant, contracts and good will of the Wagner Company, *ultra vires* the charter power of the Pullman Company, and therefore utterly null and void?

The charter of the Pullman Company, sec. 4, provides: "The said corporation shall have power to manufacture, construct, and purchase railway cars with all convenient appendages and supplies for persons traveling thereon, and the same may sell or use or permit to be used in such manner and upon such terms as the company may think fit and proper."

Section 1 creates certain parties into a body politic under the name and style of "Pullman's Palace Car Company," "with all the powers, rights, privileges and immunities incident to such corporations and necessary or useful for the purposes of this act."

Section 6 gives the corporation power to purchase real estate necessary for its uses and the right to purchase railway cars without limitation as to the number, or as to the party from whom the purchase may be made.

Treating the transaction—as contended by defendant—to be a purchase by the Pullman Company, and that in making such purchase, its sole purpose and intent was the lawful and

legitimate enlargement of its business, would it be *ultra vires* the charter of the Pullman Company, or illegal, unless thereby some law was violated or such purchase would be against public policy?

Considering solely the charter powers of the Pullman Company (and conceding the power of the Wagner Company to sell), the Pullman Company, immediately upon its organization, finding the Wagner Company willing and having power to sell, could have made a purchase such as the one in question, "as incident to, necessary, and useful," to it in the commencement of its business operations.

If it could do so, to start its business operations, no reason is perceived why it could not make such purchase at any time thereafter, if such purchase was considered necessary or useful in carrying on the business of the corporation.

Whether such a purchase would be necessary or useful to the carrying on of the business of the Pullman Company was for the managing board, the board of directors, to determine.

There is no bad faith charged against this board of directors. It is true that it is alleged that the price paid was at least double the value of the property purchased, but in the absence of a charge of *mala fides* on the part of the board of directors, the allegation is of no importance. An honest mistake of directors as to values gives neither the state nor any stockholder a ground of action.

The court cannot uphold the contention that the purchase of the Wagner Company's contracts or leases with the railroad companies would, in any event, be beyond the charter power of the Pullman Company. The power to purchase cars and lease the same to railroad companies, confers power to purchase cars which are already leased to railroad companies, and such purchase, with the assignment of such leases, was substantially the same as to make a purchase and then to lease the cars. It is doing indirectly what was authorized to be done directly, and comes within the spirit of the charter powers.

It follows that if such a purchase could be made under any circumstances, the purchase in question, conceding it to be a

purchase in fact, was not *ultra vires* the charter powers of the Pullman Company, *ex facie* the charter. It might be an abuse of the charter power, but not an *ultra vires* act.

As to whether such purchase was in violation of the anti-trust laws, or was *ultra vires* because opposed to public policy, will be discussed hereafter, but before doing so, I shall consider the contention that even if the Pullman Company had the power, under its charter, to make this purchase, the Wagner Company had no power to sell all of its property, the assets, contracts, etc., and that if the contract of sale was *ultra vires* as to the Wagner Company, it was also *ultra vires* as to the Pullman Company.

Neither the Wagner Company, nor any of its stockholders nor persons receiving or holding any of the twenty million dollars' worth of stock issued by the Pullman Company in payment to the Wagner Company, are made parties to this litigation.

The Wagner Company has been dissolved and the holders of such stock are the only persons who can, by any method of reasoning, be held to stand in its place. The proposition itself shows the necessity that the holders of such stock should be made parties to the supplemental bill.

It is no part of the duty of a court of equity to cloud titles or inflict injury upon persons not parties to a litigation in order to give relief to the litigant party before it. A stockholder in one corporation has no footing in a court of equity to enforce purely public, or redress purely private rights as to or in connection with alleged *ultra vires* acts of another corporation. That is left to the people of the state under which the corporation had its charter, or to the stockholders or creditors having an interest.

A stockholder has a standing to question the *ultra vires* acts of his own corporation by which he may be injured, because of the trust relation existing between him and the corporation, but there was no trust relation between this complainant and the Wagner Company.

If the complainant cannot challenge the *ultra vires* act of his own corporation successfully, he is, in my opinion, with-

out remedy. If the act of the Wagner Company was *ultra vires* its charter, there are equities connected with such *ultra vires* acts which would estop the stockholders from setting up the same as against the Pullman Company; as, for example, the Wagner Company, or its stockholders, having received the proceeds of such *ultra vires* act, it or they would be compelled, upon coming into a court of equity, at least to tender what had been so received before seeking equity as against such *ultra vires* act.

It is not necessary in the view I take of the power of the Wagner Company, to decide whether this equitable doctrine must be applied to the Pullman Company, if complainant should succeed in having the twenty millions worth of stock declared void and of no value.

Admitting that complainant has the right to raise the question as to the transaction being beyond the power of the Wagner Company, the question that first arises is, whether the Wagner Company had the right to dissolve. It must be admitted that it has ceased to exist as a *de facto* joint stock association, and that it would be impossible to restore the *statu quo* as it existed prior to its dissolution.

It is, however, contended that it had no right to dissolve, as it was engaged in a business affected with a public interest. It is true that a corporation chartered to carry on a business affected with a public interest is under an obligation or duty to carry on such business during the life of its charter and not to discontinue its business and dissolve, except with the consent of the state, but the law under which the Wagner Joint Stock Association was organized expressly provides that a joint stock company or association organized under that law, *may be dissolved in pursuance of its articles of association*, and its articles provide for its dissolution upon sixty days' notice to be given.

Such notice was given, the Wagner Company was dissolved and it is dead, beyond the power of any court to resurrect it.

Grant that it was organized to subserve a public purpose and was under an implied obligation to continue to do so.

There is a limitation to that obligation, granted by the state, its creator, to-wit, that it should serve the state until it chose to dissolve itself in pursuance of its articles of association.

That power to dissolve itself when it wished, without asking the consent of the state or any judicial authority, may have been the chief reason why its stockholders invested their money therein. However much it may be said that the Wagner Company resembled a corporation in other respects, in this power to dissolve at will, to sell at will and dispose of its assets at will, it had all the rights of an ordinary copartnership.

There is no limitation upon its right to dissolve by its contract with the state, nor is there any implied obligation that it will not dissolve for the purpose of selling its property, or for the purpose of enabling its shareholders to sell their interest in such property, for cash or for the stock of some other corporation.

If any of such acts are prohibited or illegal, it must be because they were a violation of some statute law or of some public policy.

The complainant relies upon the authority of the case of the *Central Transportation Company v. Pullman's Palace Car Company*, 139 U. S. 24, which its learned counsel declares to be practically upon all fours with the case at bar. It is not necessary to do more than to state the facts of that case and to refer to a few points of difference in the two cases.

The Central Transportation Company was "a corporation," formed by articles of association under the general laws of the state of Pennsylvania, concerning manufacturing companies, with a certain capital stock, for twenty years, for "the transportation of passengers in railroad cars constructed by said company," under certain patents. It carried on a sleeping car business similar to that carried on by the Wagner Company. Seven years after its incorporation, the legislature extended its charter for ninety-nine years and empowered the corporation to double its capital stock, and "to enter into

contracts with corporations of that or any other state for the leasing or hiring or transfer to them, or any of them, of its railway cars and other personal property."

The company forthwith entered into contract with the Pullman Palace Car Company, by which it leased and transferred all its cars, patents, assets of every description to the latter company for ninety-nine years, and covenanted "not to engage in the business of manufacturing, leasing, or buying sleeping cars," during the term of the lease, the Pullman Palace Car Company agreeing to pay the Transportation Company \$264,000 per annum during the entire term of the lease.

The supreme court of the United States held that the contract was unlawful and void, *involving an abandonment* of its duty to the public, and therefore no action could be maintained to recover money due under the lease for the year ending July 1, 1886.

The court says that upon the authority and the duty of a corporation to exercise the powers granted to it by the legislature and those only, and upon the invalidity of any contract made beyond those powers, or providing for their disuse or alienation, there is no need to refer to decisions of other courts than its own. It then reviews many of those decisions.

The court appears to lay particular stress upon the fact that the purpose of the incorporation of the plaintiff, the Central Transportation Company, was the "transportation of passengers," whereby it exercised a public employment and became a *quasi*-public corporation, and bound to perform such duty during the term for which it was incorporated.

Under its charter, the transportation of passengers in its own cars would undoubtedly be held to be the act or transportation by the Central Transportation Company, and it was immaterial what its arrangement was with the railroads.

In the case of the Wagner Company, it was not organized for "the transportation of passengers," and the transportation of passengers in its cars would be the transportation by the railroad companies with whom it might contract.

The Central Transportation charter ran for ninety-nine

years. It could not abdicate its powers of its own will. The Wagner Company could.

In the Central Transportation Company case, that company attempted to sell all its property, and to cease to perform its duties, and continue in its existence for ninety-nine years solely for the purpose of receiving and paying over to its stockholders the rent it was to receive from the Pullman Company.

This of course it could not do as it was under implied obligation to the state to perform, during its existence, the duties for which it was incorporated during the term of its existence.

It did not attempt to dissolve; it had no right to dissolve by its own action.

The Wagner Company was not under duty to the public to continue its existence for any specified term; it had a right to dissolve of its own motion at any time, and did dissolve.

In that case, the supreme court held that it appeared upon the face of the agreement that the object was to prevent competition, and that the duties of the Central Transportation Company should be performed by the Pullman Company.

It is, however, argued in the case at bar, that the transaction was not a purchase and sale in fact, and a court of equity will look at the substance and disregard the form used by the parties. There is no doubt of that proposition, and it is one of my favorite maxims. Therein lies the greatness of the court of equity, and its great superiority over a common-law court.

Granting that the method pursued was only an indirect way taken by the Wagner Company, or by its stockholders, to combine their property with that of the Pullman Company, and to continue it in substantially the same business, was it an unlawful act of both or either of said companies? Was it prohibited by the anti-trust statute of Illinois of 1891, or the Federal anti-trust act of July, 1893, or was it opposed to public policy?

There can be no doubt but that the charter powers of the two companies were substantially the same, so far as the leas-

ing of cars and the providing of sleeping, parlor and dining car accommodations on different railroads; that the business of each was similar, but that the Pullman business was more extensive and particularly in the manufacture of cars.

The charter of the Pullman Company gives the right to carry on the business, known as the sleeping and parlor car business, in which it has been engaged, and in which the Wagner Company was also engaged, but it confers no power as to the transportation of passengers, or to run a line of railway or cars with its own motive power. Its business is not independent of, and cannot be, but is only accessory to that of the railroad companies.

A railroad company is under an obligation and duty to furnish transportation to the public and to furnish all known appliances.

The railroad may furnish sleeping, parlor and dining cars, but whether it can be compelled to do so, it is unnecessary to decide. It may furnish its own cars and operate the same if it desires to do so, or it may lease cars and contract for service to be rendered in connection with the running thereof, with any person or corporation that it sees fit, upon such terms and conditions as may be agreed upon. When it leases cars from the Pullman Company and contracts with it for the employment of service in connection with the running of said cars, the transportation and the accommodation in connection therewith rendered, is that of the railroad company. The obligation or duty as to such transportation is upon the railroad company; the franchise exercised is that of the railroad company.

It does not appear that the Pullman Company has any exclusive patents for sleeping cars or has a monopoly of the raw material or of the art of manufacturing sleeping cars. It would be difficult, if not impossible, for the Pullman Company to obtain a monopoly of the sleeping car business without the co-operation of the railroads.

There is no allegation charging that the railroads are combining with the Pullman Company to enable the latter company to obtain such a monopoly. The Pullman Company has

no franchise to require or demand of the railroad companies, or any of them, to lease its cars or haul its cars, or that the Pullman Company shall operate any sleeping or parlor cars attached to any railroad train. It only obtains such rights by contract with the railroad company. It is under no public duty, by the letter of its charter, to furnish sleeping cars or parlor cars, to run them or to operate them. After it has contracted to furnish such cars for a railroad company and the accommodations connected therewith, it is then in the performance of such contract and it may be performing a service in which the public is interested, but it arises from its voluntary contract with the railroad company and not from any public obligation or duty imposed upon it by its charter.

Both the railroad company and the Pullman Company, in performing such service, are subject to legislative regulations as to such service and the charges therefor.

It may be true (but it is denied in defendant's answer) that by the transaction in question the Pullman Company gets rid of its chief competitor in the business of leasing sleeping and parlor cars to railroad companies and performing service in connection with such cars, but that does not enable the Pullman Company to limit or reduce the operation or the number of sleeping and parlor cars upon the railroads of the United States, or to control and change the price for such accommodations throughout the United States. While its chief competitor may have been removed by reason of this purchase, yet the right to contract in that respect with railroad companies is open to all, and it is shown that there are a large number of companies and corporations competent and able to compete with, and competing with the Pullman Company in leasing to the railroads sleeping and parlor cars, and furnishing the necessary conveniences and labor connected therewith.

It is not every combination that is prohibited by the anti-trust laws, or that is opposed to public policy.

It will be admitted that one merchant may buy out the stock of another and unite it with his own, or the two may combine their stocks and form a co-partnership, or may combine their stocks and one take only a percentage of future

profits agreed upon. This may, and does, lessen competition and does not necessarily increase prices or prevent competition. What can be done by individuals as such may be done by co-partnerships, by mercantile or unincorporated associations or companies. Not only may contracts of this nature be made, but covenants not to engage in business within a limited number of years, or at the same place, have uniformly been sustained by the courts, as not being an unreasonable restraint of trade and held to be lawful. In the *Diamond Match Company* case it was not only held that one party may legally purchase the trade and business of another, for the very purpose of preventing competition, but also a covenant not to engage in the same business in the United States (excepting therefrom Nevada and Montana) was upheld. *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

The right to hold property and to contract in reference thereto is protected by the constitution of this state, and by most of the states, if not all, in the Union.

Our supreme court, in construing sec. 2, art. 2, of our state constitution, "no person shall be deprived of life, liberty or property without due process of law," declares in *Ritchie v. The People*, 155 Ill. 98, 104, that "the privilege of contracting is both a liberty and a property right," and that the right to use, buy and sell property and contract in respect thereof is protected by the constitutional clause quoted. Also that "hence the right to make contracts is an inherent and inalienable one, and any attempt to unreasonably abridge it is opposed to the constitution," and cites with approval the case of *Leeps v. St. L., I. M. & S. Ry. Co.*, 58 Ark. 407, which holds "where the subject of contract is purely and exclusively private, unaffected by any public interest or duty to persons, to society or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof." (*Ritchie v. People*, 155 Ill. 98, 109.) In *Frorer v. People*, 147 Ill. 171, the court, in construing our constitution as to the same article, says: "So, under what is denominated the 'police power'

laws may be constitutionally enacted imposing new burdens on persons and property, and restricting personal rights of enjoyment of property, where, in the opinion of the general assembly, the public welfare demands it—under which may be instanced license laws, * * * fire limits * * * laws to prevent monopoly, etc.”

It must be admitted that all so-called anti-trust laws, all laws to restrain or interfere with the freedom of contracts, are the exercise of the police power, and that the only justification for such laws is that the public welfare, the interests of the public demand their enactment. But they must be read and construed, in the light of the constitutional guarantees of the right to hold property and contract with reference thereto.

The original anti-trust act, passed in 1891, has been held by our supreme court to be a valid exercise of the police power, and therefore constitutional. (*Harding v. Am. Glucose Co.*, 182 Ill. 551.)

But the anti-trust legislation of this state since 1891 has been of such a character as to raise doubts as to what is now the law of this state upon that subject. Whether this confusion has been made by the friends or the enemies of such legislation is a matter of doubt.

The vital prohibition as to trusts and combinations, which has been so vigorously upheld by our supreme court, is to be found in section 1 of the act of 1891, which originally read as follows:

“If any corporation organized under the laws of this or any other state or country, for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be man-

ufactured, mined, produced or sold in this state, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment, as provided in this act.” (Laws Ill. 1891, p. 206.)

This was amended by the act of 1897, which re-enacted, word for word, said section 1, and added the following proviso:

“Provided, however, that in the mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages, it shall not be unlawful for persons, firms or corporations doing business in this state to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages.” (Laws Ill. 1897, p. 298.)

The effect of this very peculiar amendment or attempted amendment has not been before the supreme court to my knowledge.¹ The question came before three judges of this court,² two of whom held that the amendment rendered the entire section inoperative and void, while the other, the writer of this opinion, held the amendment itself to be a violation of the constitution, therefore without effect, leaving section 1 as originally passed in full force. Assuming the original section 1 of the act of 1891 to be in full force, was the transaction in question obnoxious to its provisions?

I have heretofore in this opinion pointed out the bearing of the case of the *Central Transportation Company v. Pullman's Palace Car Company*, 139 U. S. 24, upon the transaction in question, and it will not be necessary to consider that case further in this connection.

Nor do I regard the case of *Elkins v. C. & A. Ry. Co.*, 36 N. J. Eq. 5, as in any manner controlling the transaction in question. That case, which is much relied on by com-

¹ The amendatory act of 1897 has since been held unconstitutional in *People ex rel. v. Butler Street Foundry & Iron Co.*, 201 Ill. 236.—Ed.

² *Richards & Kelly Mfg. Co. v. People*, 1 Ill. C. C. 171, *infra*.—Ed.

plainant, was a case where one railroad company absorbed by purchase a parallel railroad, thereby putting it in a position where it could control the traffic tributary to both railroads. It necessarily resulted in a monopoly as to carriage and transportation between the points upon said two railroads and enabled the railroad which had absorbed the other to raise prices at will. It was so evidently an *ultra vires* act of the absorbing road, and so evidently against public policy, that no attempt was made to justify the purchase or the absorption, but the only effort to sustain it was the contention that it came within the provisions of the state statute allowing consolidation in certain cases.

As has been heretofore shown, the purchase or combination of the Pullman Company with the stock and property of the Wagner Company, did not necessarily give the Pullman Company the power to increase prices or prevent competition in the business of contracting with railway companies for the use of sleeping cars and furnishing accommodations connected therewith, and that it was the purchase and absorption by a corporation of a joint stock association having power at will to dissolve itself and sell its property, in which respect it had all the right and power of an ordinary co-partnership.

Much reliance is placed by complainant upon the case of *Harding v. Am. Glucose Co.*, 182 Ill. 551.

The only application of that case to the one at bar is the decision of the court as to what constitutes a trust or combination in violation of the Illinois anti-trust act of 1891.

In that case there was a scheme among six corporations to unite their properties in one corporation, to be created to carry on the business formerly done by the six companies, being all the corporations engaged in the business within the glucose corn belt, except one small concern. The court held that if the scheme was consummated, it would necessarily result in the suppression of competition and create a monopoly in the new corporation, and that the new corporation would necessarily then possess power to limit production and control prices.

The scheme in the case at bar (if there was any scheme)

was for the Pullman Company to absorb the Wagner Company, which was to dissolve, and thereby prevent competition between the two companies, but there were left all the railroad companies and a score or more of manufacturing companies that might compete for, or engage in competing for, the sleeping car business of railroads. Nor, as in that case, did the scheme, being carried into effect, vest the Pullman Company with the power and discretion to raise prices at any time it saw fit to do so. It may be true that the Pullman Company has such a commanding influence in the business that with the consent and co-operation of all the railroad corporations it could raise prices, but it is not charged that there has been such co-operation, or that such is in contemplation, nor that there was any combination with any railroad for any such purpose.

In my opinion, such co-operation or combination of the defendant and a railroad company, is not, in the nature of the railroad business, likely to occur. The effect of such a combination would be to increase the cost of transportation, thus making the cost of transportation in excess of that upon other competing roads.

The effect of absorption of the Wagner Company was not substantially a wiping out of all competition, as was the scheme in the Glucose case (*Harding v. Am. Glucose Co.*, 182 Ill. 551, *supra*).

Now, did the transaction create, as alleged, a virtual monopoly of the sleeping car business?

It is not sufficient, in my opinion, under the authorities, that the transaction challenged may tend to restrain competition or tend to create monopoly. Every purchase by one merchant of the stock of another tends to lessen competition. One manufacturer may buy out the plant of another; that also tends to lessen competition in that line of manufacture, but to hold that this could not be done is, as stated before, to destroy all freedom of commerce and to violate or infringe upon the rights of parties to make contracts in respect of their property.

Treating of anti-competitive contracts, Spelling says: "It

is only when such contracts are publicly *oppressive*, that they become unreasonable. * * * 'All the cases, ancient and modern, agree that a combination the tendency of which is to prevent *general* competition, and to control prices, is detrimental to the public, and, consequently, unlawful.' " Spelling, Extraordinary Relief, sec. 1821.

The authorities, I regard as laying down the rule that the transaction complained of must necessarily put the purchaser in the position where he can, if he desires, create a monopoly,—put him in a position where he substantially controls the general market, and at his will he may raise prices or limit production, or, if the combination complained of arises from a trust or other agreement between the parties, such agreement must expressly or impliedly confer power to accomplish such results, or it must be evident upon the face of the transaction, together with the surrounding circumstances, that such was the object and intent of the parties thereto. Any other rule would be to impose an undue and unwarranted restriction upon the acts and rights of the parties, and upon the freedom of commerce.

It is contended that the transaction in question violated the Federal act entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," passed July 2d, 1890.

Much that has been said in this opinion showing that the transaction in question did not violate the anti-trust laws of the state of Illinois is directly applicable to the question presented by the Federal act referred to, and it is not necessary to repeat the same in this connection.

The case of *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, and *United States v. Joint Traffic Association*, 171 U. S. 505, are cited and relied upon by complainant's counsel. The agreements in each of these cases, which were condemned by the United States court, were agreements among a large number of railroads, and practically all the railroads engaged in the freight business through and over a certain district or territory in the United States, by which all freight rates were fixed by a committee chosen by the par-

ties to the agreement, which the court held constituted a combination of public service corporations into one powerful and consolidated association for the purpose of stifling competition among themselves.

The court, in the later case (the 171st U. S.) considered the agreements passed upon in the prior case (the 166th U. S.) and held that they were substantially the same, and that the "natural and direct effect of each of the agreements was the same, viz., to maintain rates at a higher level than would otherwise prevail."

There may be language in these cases, which, when taken disconnected from the case, might appear to be applicable to the case at bar, but the facts, the agreement in the transaction in question in this case and those in the cases in the 166th and 171st U. S., referred to, are so dissimilar as to render those cases of but little weight in the decision of the case at bar. The transaction in question does not, in the opinion of the court, violate any provision of the United States statute referred to.

As to the contention that the transaction was against public policy, and therefore void, public policy has been defined as follows:

"By 'public policy' is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed the policy of the law or public policy in relation to the administration of the law."¹

"Public policy," it must be admitted, is a very indefinite term, and in deciding whether a particular transaction contravenes it, the court has a great latitude in the application of the doctrine.

Spelling very aptly says: "No reliable rules for determining to what extent competition may be suppressed or bought off, without contravening public policy against monopolies, can be laid down. Virtually the same state of facts have, in

¹ Per Lord Brougham in *Edgerton v. Brownlow*, 4 H. L. Cas. 1.—Ed.

different courts, led to opposite decisions. This must, of necessity, ever be so, while so indefinite an idea as that designated by the term 'public policy' is made the test and basis of decisions. The character of institutions, the temper of the people, and the peculiarities of the business and industries in which they are engaged within the jurisdiction where the question arises, have their separate and combined influence in shaping the policy of the state, and the view of courts. Much more do local statutory and constitutional provisions affect the question." Spelling, Extraordinary Relief, sec. 1821.

The public policy of our state as manifested by the act of 1891 has been held by our supreme court to be that of opposition to all combinations in restraint of trade, or to limit production, control prices, or to create a monopoly. *Ford v. Chicago Milk Shippers' Ass'n*, 155 Ill. 166.

"The public policy of a state is to be found in its statutes, and where they have not directly spoken, then in decisions of the courts. * * * When the legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statutes by it indicate." *United States v. Freight Ass'n*, 166 U. S. 290; *Harding v. Glucose Co.*, 182 Ill. 551; *supra*.

The courts cannot permit that to be declared against public policy which the state permits to be done. To permit the courts to declare that to be illegal and void which is authorized by the legislature of the state, would be to substitute the courts for the legislature. As the legislature dictates what shall be the public policy of the state, it may be interesting to inquire what "public policy" has been indicated by the legislature of our state, since the passage of the act of 1891, which has been so vigorously upheld by our supreme court in the decisions heretofore cited.

In 1893, the legislature of this state passed an act defining trusts—already comprehensively defined in the act of 1891.

There was no necessity for such a law, and by some strange oversight (or intentionally) the act of 1893 failed to prohibit the formation of trusts. Purporting to be a revision of the

subject-matter of "trusts," it is contended by many that it operated to repeal the act of 1891.¹

In 1897, the legislature added to section 1 of the act of 1891 the proviso to which I have heretofore referred. If this proviso is constitutional, it is expressly made lawful for all persons, firms or corporations, engaged in mining, manufacturing or production of merchandise, the cost of which is mainly made up of wages, to enter into *any joint arrangement*, the principal object of which is to maintain or raise wages.

The bill in this case fails to allege that the Pullman Company and the Wagner Company do not come within the terms of said proviso.

The same legislature passed an act ratifying the combinations, consolidations and agreements of all railroad companies made between July 1, 1874, and July 1 1883.²

The same legislature also passed an act authorizing city councils to extend for the term of fifty years ordinances granting rights to construct and operate street railways in the public streets of cities, towns, etc.; and providing that there should be no grant to any other corporation, except with the consent of the owners of a majority of the street frontage on the street to be occupied and giving any property owner the right to an injunction to prevent the laying of any such tracks in the street without a full compliance with the requirements of the law as to street frontage.³

The latter provision was intended to give existing street railways a monopoly.

The same legislature passed an act allowing all gas companies doing business in the same city, town, etc., to consolidate and merge into a single corporation. It is clearly apparent upon the face of this act that it was intended to give existing gas companies a monopoly in the furnishing of gas in the cities, towns, etc., of this state.⁴

¹ The Act of 1893 was held unconstitutional in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.—Ed.

² Laws of Illinois, 1897, page 281.—Ed.

³ Laws of Illinois, 1897, page 282. This act was repealed by Act of March 7, 1898, Laws of Illinois, 1899, page 331.—Ed.

⁴ Laws of Illinois, 1897, page 177. This act was held constitu-

It also passed a separate act intended to protect existing gas and electrical lighting companies from competition by new companies, by requiring the consent of the owners of a majority of the frontage of the streets and alleys to be occupied, and giving individuals the right to litigate the question of frontage by injunction.¹

The same legislature also passed an act expressly giving grain warehousemen in Chicago the right to buy, own and store their own grain in their own warehouses mixed with that of their customers; which practice, under a prior law, the supreme court of the state declared tended to create a monopoly in the owners of warehouses² (*Central Elevator Co. v. People*, 174 Ill. 203).

The storm of indignation aroused in the state by the attempt to give a monopoly to the street railways for fifty years caused a repeal of that law, but the others remain in full force.

The legislation I refer to would seem to indicate that the "public policy" of the state, of opposition to combinations and monopolies has changed to a public policy favoring combinations and monopolies.

Unless a court can see that some existing *anti-trust* statute has been violated, any decision founded upon the theory that the "public policy" of the state is that of opposition to trusts and combinations would reflect more the individual leaning of the judge than the public policy indicated by the legislation of this state since 1891.

In conclusion, no case has been cited, and the court knows of none, which can be said to be similar to the case at bar. The precise questions herein have never been determined.

As said in the section of Spelling before referred to, "The most important factor of commercial life is the liberty of contracting, and it should not be abridged except when it is made

tional in *People ex rel. v. People's Gas Light & Coke Co.*, 205 Ill. 482.—Ed.

¹ Laws of Illinois, 1897, page 100.

² Laws of Illinois, 1897, page 302. This act was held unconstitutional in *Hannah v. The People*, 198 Ill. 77.—Ed.

clear that the public will be injuriously affected by its unrestrained exercise in a particular case," (Spelling on Extraordinary Relief, sec. 1821).

The laws of trade appear to be almost as irresistible as the laws of nature. These combinations are the evolution of trade and appear to be demanded by the present economic conditions. Whether they should be absolutely prohibited or merely regulated in the public interests is more of an economic or political question than a judicial one.

Such laws as the legislature deem it necessary to enact in that regard should be strictly construed and enforced in favor of the public; but the constitutional right to own property and contract with reference thereto, should not be infringed or abridged, except in a case where it is made clearly to appear that unless there is such interference, the public will be injuriously affected. This is not such a case.

The court has passed upon the right of this complainant—who owns but a little more than one-hundredth part of one per cent. of the capital stock of the Pullman Company—to relief in a court of equity, and has held that upon the pleadings, affidavits and documentary evidence in the case, that he is not entitled to an injunction or to any equitable relief.

The question whether or not the complainant has the right to recover at law from the Pullman Company, or its directors, his damages, if any, which he has suffered—by reason of the transaction complained of in his bill filed herein—has not been considered by the court.

The order, therefore, will be that complainant's motion for leave to file the supplemental bill tendered and his motion for a preliminary injunction are both denied; that the court, being of the opinion that complainant's bill is incapable of amendment so as to entitle him to any equitable relief, the defendant's motion to dismiss complainant's bill for want of equity is granted and that complainant's bill be dismissed for want of equity, at complainant's costs, but without prejudice to complainant's right, if any he has, to sue at law.

NOTE.

MOTIVE IN INSTITUTING AN ACTION.—It is the general rule that where one has a valid cause of action against another, his motive

in instituting it is immaterial, and the fact that it is inspired by malice is no defense. *Hodge v. U. S. Steel Corp.*, 64 N. J. Eq. 111, 53 Atl. 553; *MacGinniss v. Boston & M. Consol. Copper Co.*, 29 Mont. 428, 75 Pac. 89; *Jacobson v. Van Boening*, 48 Neb. 80, 66 N. W. 993; *Macey v. Childress*, 2 Tenn. Ch. 438; *Ramsey v. Gould*, 57 Barb. 398; *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546; *McInnes v. McInnes Brick Mfg. Co.*, 38 Atl. 182 (N. J.); *Bordeaux v. Greene*, 22 Mont. 254, 56 Pac. 218; *Raughley v. Railroad Co.*, 202 Pa. 43, 51 Atl. 597; *Adams v. Union R. R. Co.*, 21 R. I. 134, 42 Atl. 515; *Phelps v. Nowlen*, 72 N. Y. 39; *Pickard v. Collins*, 23 Barb. 444; *Clinton v. Myers*, 46 N. Y. 511; *Merrill v. Dibble*, 12 Ill. App. 85; *Oglesby v. Attrill*, 105 U. S. 605; *Cook, Corporations* (5th ed.) § 736.

The law has nothing to do with the motive of a legal act. *Guardian Trust Co. v. White Cliffs Co.*, 109 Fed. 523; *Toler v. Railroad Co.*, 67 Fed. 168; *McMullen v. Ritchie*, 64 Fed. 253; *Lafayette Co. v. Neely*, 21 Fed. 738; *United States v. Isham*, 17 Wall. 496.

(Superior Court of Cook County. In Chancery.)

Marshall Field & Co.

VS.

Frederick Becklenberg, doing business as Becklenberg Express Company, and twelve other cases of a similar nature.¹

(July 6, 1905.)

1. CITY EXPRESS COMPANIES ARE COMMON CARRIERS. City express companies carrying goods from one portion of the same city to another for all who choose to employ them are common carriers and can make no arbitrary, unjust or injurious discriminations between individuals in their dealings with the public.
2. CITY EXPRESS COMPANIES MUST CARRY FOR ALL ALIKE UNDER ORDINANCES OF THE CITY OF CHICAGO. Under the ordinances of the city of Chicago, city express companies cannot refuse to carry

¹ The other cases were: *Carson, Pirie, Scott & Co. v. Frederick Becklenberg*; *Walsh, Boyle & Co. v. South Chicago Steamboat Exp. Co.*; *Steele-Wedeles & Co. v. South Chicago Steamboat Exp. Co.*; *McNeil & Higgins Co. v. Brink's Chicago City Exp. Co.*; *Reid-Murdoch & Co. v. Brink's Chicago City Exp. Co.*; *Walsh, Boyle & Co. v. Page*; *The Fair v. Page*; *Walsh, Boyle & Co. v. Chicago & West Suburban Exp. Co.*; *Durand & Kasper Co. v. Johnson Express Co.*; *The Fair v. Johnson Express Co.*; *Franklin MacVeagh & Co. v. Johnson Express Co.*; *Reid-Murdoch & Co. v. Johnson Express Co.*

or convey merchandise, goods, etc., tendered them to be carried within the city.

3. **THAT A STRIKE MAY RESULT IS NO EXCUSE FOR REFUSAL OF COMMON CARRIER TO RECEIVE GOODS.** It is not a sufficient excuse for a common carrier, a city express company, to avoid its duty to receive and transport goods, that if it accepts the goods and carries them, all its teamsters will go on a strike, and tie up the business of the city express company or common carrier.
4. **NO EXCUSE FOR REFUSAL OF ONE CARRIER TO CONVEY GOODS THAT OTHER CARRIERS ARE AVAILABLE.** That many other like carriers are available is no reason for a carrier refusing to convey goods, as the law is equal in its operation on all alike, and such other carriers if applied to might upon the same grounds refuse to serve.
5. **MANDATORY INJUNCTION AGAINST COMMON CARRIERS.** When complainants are frequent shippers and a continuous series of shipments is necessary in conducting their business, a mandatory injunction is the proper remedy to compel common carriers to perform their duties and carry goods tendered for transportation, since actions at law would result in a multiplicity of suits.
6. **MANDATORY INJUNCTION TO COMPEL CITY EXPRESS COMPANIES TO CARRY GOODS—POSSIBILITY OF STRIKE NO EXCUSE.** Complainants are wholesale merchants and large retail dealers carrying on business in Chicago. A strike was instituted by the Teamsters' Union against the firm of Montgomery Ward & Co., and all merchants who delivered goods or orders to Montgomery Ward & Co. were boycotted and their teamsters ordered on strike by the union. Complainants delivered goods to Montgomery Ward & Co., and their teamsters went on a strike. The city express companies in Chicago refused to accept goods for transportation from the complainant firms on the ground that if they did so all their teamsters would strike and tie up all the business of each city express company so accepting and carrying complainants' goods. *Held*, that the possibility of a strike was no excuse and that a mandatory injunction should issue compelling the defendant city express companies to accept and carry the goods tendered to them by complainants.

Bill for mandatory injunction in twelve cases in circuit court, Cook county. Five cases heard upon bill, answer and supporting affidavits, and seven cases heard upon general demurrers to the bill. Heard before Judge Jesse Holdom.

Moran, Mayer & Meyer, solicitors for Marshall Field & Co., Carson, Pirie, Scott & Co., Reid, Murdoch & Co., Walsh-Boyle

& Co., Franklin MacVeagh & Co., Steele-Wedeles Co., Durand & Kasper Co., The Fair and McNeil & Higgins, complainants.

James A. Brady, solicitor for Brink's Express Co., defendant.

D. D. Trexler, solicitor for Frederick Becklenberg, defendant.

Charles W. Lamborn, for certain other defendants.

HOLDOM, J.:—

Complainant in this, and eleven other similar cases file their several bills for a mandatory injunction against all the defendants to compel carriage and delivery of the goods and merchandise of the several complainants in the city of Chicago by the defendants on the ground that each and all of them are common carriers using wagons and horses as means of transportation in said city.

The controversies here arise out of industrial strife of which this city seems to be the storm center.

In December, 1904, nineteen garment workers, employes of Montgomery Ward & Co., went out on a strike, and because the business of the firm continued without interruption and apparently its prosperity was unaffected by the disaffection of the nineteen whose demands remained unsatisfied, organized labor, on April 26th, 1905, interfered and championed the cause of the striking garment workers and a sympathetic strike was declared by the Teamsters' Union as the most effective means to the desired end, as Montgomery Ward & Co.'s business was such, that it could not continue or exist long without the use of wagons and horses with teamsters to handle them. Thereupon all union drivers employed by houses delivering or receiving goods to or from Montgomery Ward & Co. or knowingly to the Teamsters' Union transacting business with them, left their employment and went out on a strike, and a "boycott" was proclaimed and maintained against all such houses including Montgomery Ward & Co.

Complainants in this and the other eleven cases heard with it, lost their union drivers because they continued to do business with the boycotted house of Montgomery Ward & Co.,

and as usual, force and violence on the part of the Teamsters' Union and the union drivers have been freely resorted to in an attempt to prevent other drivers taking the places so vacated voluntarily by the union men and also prevent their former employers from transacting their usual affairs of business; hence the spectacle is presented in our busy streets of policemen riding upon the wagons of these boycottd houses; the usual scenes of strife and bloodshed have followed and unhappily still continue.

It is charged that the defendants in these twelve cases are common carriers both at common law and by virtue of a city ordinance entitled "Public Carts, Express Wagons, Furniture Vans, Trucks, Drays," etc.; and as such common carriers are bound to carry goods and merchandise without discrimination for the public generally and at an uniform charge. The defendants are engaged in what is colloquially known as the "express business" in the city of Chicago, and in the same way are called "expressmen," terms locally having a well defined meaning.

Defendants concede in a limited way that they are common carriers. Whether they are such at common law or under the terms of the municipal ordinance *supra* is not very material, for if by the common law then they are in a tentative and restricted sense controlled and regulated within the limits of the city of Chicago by the ordinance.

Section 2342 of the ordinance is in terms declaratory of the duty of a common carrier at common law. It provides that:

"No person driving or in charge or control of any public cart shall refuse to convey, within the city, the goods, wares, merchandise, or other article or thing of any person when applied to for that purpose; or having undertaken to convey such goods, wares, merchandise, or other article or thing shall omit or neglect so to do, or shall ask, take, or demand from any person desiring to have conveyed, or having had conveyed to any place in the city, any such goods, wares or merchandise any greater rate than that herein established * * *

(Tolman's Revised Municipal Code of Chicago, 1905, sec. 2342).

A refusal by defendants to carry or receive goods from complainants to or from any of the struck or boycotted houses was clearly violative of their duty under the provisions of the ordinance referred to.

Bouvier's Law Dictionary, Rawle's Revision, defines a common carrier as "one whose business, occupation or regular calling is to carry chattels for all persons who may choose to employ or remunerate him. * * * The definition includes carriers by land and water. They are on the one hand stage coach and omnibus proprietors, railroad and street railway companies, truckmen, waggoners and teamsters, car men and porters and express companies, whether such persons undertake to carry *goods from one portion of the same town to another*, or through the whole extent of the country, or even from one state or kingdom to another. * * * Carriers both by land and water when they undertake the general business of carrying every kind of goods, are bound to carry for all who offer, and if they refuse without just excuse they are liable to an action."

Defendants' duties and obligations are embraced within the foregoing definition in the territory over which they hold themselves out as doing business.

In *Parmalee v. McNulty*, 19 Ill. 556, and *Parmalee v. Lowitz*, 74 Ill. 116, carriers of baggage are held to be common carriers and subject to all the duties and obligations of common carriers.

In *St. Louis, etc. R. R. v. Hill*, 14 Ill. App. 579, Judge Baker, afterwards of the supreme court, tersely and forcibly states the common-law doctrine of common carriers thus, on page 581:

"The statement, one is a common carrier, *ex vi termini* imports a duty to the public, and a corresponding legal right in the public; a right common to all," and continuing on page 582, declares: "Another duty imposed on him"—[the common carrier]—"is to make no unjust, injurious or arbitrary discriminations between individuals in his dealings with the public. The right to the transportation services of the common carrier, is a common right, belonging to everyone alike."

Webster defines a common carrier as "one who undertakes for hire, to transport goods from one place to another." And Anderson's Law Dictionary: "One who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place." And Wood on Railways (2d ed.), vol. 3, p. 1876: "One who plies between certain *termini*, and openly professes to carry goods for hire for all such persons as may choose to employ him." Hutchinson on Carriers (2d ed.), sec. 59; *Swift v. Ronan*, 103 Ill. App. 475.

Defendants answering the bill admit they carried the goods and merchandise of complainants, or some one of them, on occasions prior to the inauguration of the strike of April 26, last, and profess amity of feeling toward complainants, and expressly aver they have no fault to find with their dealings, except possibly a desire for more extended patronage prior to the strike and an embarrassment at their present demands. No claim is set up that the business of defendants as common carriers has been so restricted as not to embrace the carrying of goods or merchandise such as required by complainants' business necessities; but on the contrary the only tangible reason assigned for their refusal to carry the goods and merchandise of complainants as demanded is, that the defendants' teamsters and drivers belong to the Teamsters' Union who have declared this sympathetic strike, and if such union men are ordered to transact business with any of the so-called "boycotted houses" they will refuse to obey and go on a strike which will paralyze the business of defendants and cause them to suffer irreparable loss and damage; that other men cannot be procured to fill the places made vacant by the union drivers, and that the police of Chicago owing to present strike conditions would be unable to afford protection to their property or men, and that their barns and warehouses with their contents would be liable to damage and destruction at the hands of the strikers.

The premises considered, is the excuse sufficient? Can complainants be deprived of their right to continue in and conduct their business affairs fully and as amply as they desire and the law permits by a body of men unknown to the law

arbitrarily and by unlawful means interfering to prevent? The logical and seemingly incontrovertible answer is that the excuse is totally insufficient and that however inconvenient it may be to defendants to perform their legal duty under the circumstances environing them a sound public policy inhibits the recognition by the courts of any such excuse, as to do so would be subversive of lawful authority and a due administration of public justice under the established forms of law. The character of the business of the defendants is impressed with a duty to the public, which cannot be avoided except for the most cogent reasons which it may be said are encompassed by conditions time out of mind designated by courts and text writers as the act of God or the public enemy, conditions happening without the intervention of man.

In *Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co.*, 34 Fed. 481, it was held no sufficient excuse to avoid the duty of a common carrier that a strike of locomotive engineers and firemen had been ordered on plaintiff's road, and that if defendant's road should accept cars from the boycotted road its own men would be called out. In commenting on this excuse the court said, on page 484: "No temporary inconveniences to the defendant company or the public whom it serves are, in my judgment, for one moment to be compared with the fatal consequences which must ensue from a precedent by which it would be held that a railroad company may, in violation of the law of the land, refuse to receive and haul the cars of a connecting line at the command of any irresponsible persons or from its own belief and apprehension that its employees will leave its service, and stop the operation of its lines. Such an excuse as this is wholly inadmissible and must be set aside."

High on Injunctions, 3d ed., sec. 621a, announces a similar doctrine.

This language applies with equal force to defendants and their duties as common carriers are subject to like tests, and their excuse, like that of the railroad company, must be set aside; it is impotent to relieve them.

Having established the duty of defendants as common carriers and demonstrated the fallacy of their excuses, we proceed

to consider whether the remedy open to complainants is the one invoked.

Complainants have a remedy at law, but such remedy would unduly multiply the number of suits and could only secure indemnity for past breaches of duty and damages incurred to the time of instituting such suits. The law side of the court is powerless to give aid looking to the future needs of complainants' business enterprises or to compel defendants to carry their goods, but resort must be had to a court of equity to compel defendants to perform their duty as common carriers and furnish complainants the aid which they need in carrying forward uninterruptedly their business and having their goods and merchandise carried to and from the boycotted houses with the same facility as other business houses not under the ban and blight of the union teamsters' strike.

The contention of the answering defendants that there is no urgent necessity of requiring them to serve complainants at this time because there are many other like carriers available, is without either force or merit, for, as the law is equal in its operation upon all alike such other carriers if applied to might upon the same ground refuse to serve and complainants would be without relief.

In *Smith v. Bates*, 79 Ill. App. 519, the court said on page 526: "Appellee may have had a remedy at law but in the nature of things it could not have been as full, adequate and complete as in a court of equity. The jurisdiction in equity attaches, unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances."

That a mandatory injunction is an appropriate form of relief in cases of this character is directly held in *Chicago, B. & Q. Ry. v. Burlington, C. R. & N. Ry.*, 34 Fed. 481, *supra*, and *High on Injunctions*, 3d ed. sec. 621a.

The court held in *Scofield v. Railway Co.*, 43 Ohio St. 571, that where plaintiff's business was such as to make them frequent shippers and that a continuous series of shipments was necessary in conducting their business and that remedy

by actions at law would result in a multiplicity of suits, the court will interfere by injunction. The condition in the Scofield case is analagous both in fact and principle to the cases now before the court, and must be regarded as controlling.

To a like effect is *Toledo, etc. v. Penn. Co.*, 54 Fed. 730, and *Tift v. Southern Railway Co.*, 123 Fed. 789. See also *Vincent v. C. & A. Ry.*, 49 Ill. 33; *Inter Ocean v. Associated Press*, 184 Ill. 438; *In re Lennon*, 166 U. S. 548.

The court is not insensible to the hardships of the situation confronting defendants, probably not intentionally of their own making. They may be victims of a vicious system forced upon them by a growth so imperceptible as to have enmeshed them in its toils unawares, yet this does not relieve them from the performance of their duty to the public, including these complainants, as common carriers, so long as they choose to remain in that business. They are charged with the responsibilities which the law casts upon them to the same extent as they are permitted to reap the fruits of their enterprise, responsibilities which can be neither shirked nor avoided. If in the upholding of the law in the conduct of their business it becomes necessary to make financial or other sacrifices, however burdensome they may be, the law demands that they be made to the utmost essential limit.

Five cases are heard upon bill, answer and supporting affidavits, and seven cases on general demurrers to the bill. The demurrers have been overruled, and a temporary mandatory injunction is granted in the twelve cases, to remain in force until the further order of the court. Leave is given demurring defendants to answer the bill within ten days. Injunction bonds with penalties of from \$5,000 to \$20,000 each will be required as heretofore intimated.

The following injunction order was issued in these cases on July 6, 1905:

Now comes on to be heard the bill of complaint herein and defendant's answer thereto and complainant's affidavit in reply and the complainant's motion for a temporary injunction; and the court being fully advised in the premises, and having read said bill of

complaint, answer and affidavit, and said defendant having had due notice hereof and being now present in open court, the court finds that it has jurisdiction of the subject-matter hereof, and of the parties hereto; and that said complainant is entitled to a temporary injunction as prayed in said bill of complaint.

Wherefore, the premises considered, it is hereby ordered, adjudged and decreed that said defendant, its servants, agents and employes, and each and every of them be restrained and enjoined from refusing to transport, haul, convey or deliver within the city of Chicago, in said Cook county, bundles, parcels, packages, goods, wares and merchandise, consigned to or from said complainant, or to be delivered to or received from the place or places of business of said complainant within said city of Chicago and be it further restrained and enjoined from discriminating within said city against said complainant, or the goods, wares and merchandise bought, sold and dealt in by said complainant, or to be delivered within said city, to or from said complainant's said place or places of business, in the city of Chicago, state aforesaid, so long as said defendant shall receive or be tendered therefor the regular and usual charges received by said defendant for like services.

Said bundles, parcels, packages, goods, wares and merchandise, hereinbefore referred to, are those which are to be delivered by said defendant to or from the localities and routes in said city of Chicago, in which said defendant in the regular course of defendant's business has heretofore made deliveries and carriage of bundles, parcels, packages, goods, wares and merchandise.

And that said temporary injunction shall remain in full force and effect until the further order of this court.

That said complainant shall file an injunction bond, with good and sufficient surety, conditioned according to law in the sum of ——— dollars, which said bond is now here in open court presented, approved and filed.

NOTE.

An appeal to the appellate court of the first district was taken by the defendant in the case of *Reid, Murdoch & Co. v. Brink's Chicago City Express Co.* (one of the above cases), and the case docketed in the appellate court No. 12,486, October term, 1905 (*Brink's Chicago City Express Co. v. Reid, Murdoch & Co.*) The appeal was taken under the statute allowing appeals from interlocutory orders concerning injunctions and receivers, which provides that such appeal must be taken within thirty days from the entry of the interlocutory order or decree and perfected in the appellate court within sixty days from the entry of such order or decree. (Hurd's 1905 Statutes,

p. 234.) The injunctional order was entered on July 6, 1905, the appeal bond was filed on July 15, 1905, but the transcript of record was not filed in the appellate court until September 5, 1905, which was *sixty-one* days from the entry of the order. *Sept. 4, 1905*, was Labor Day and a legal holiday, and the office of the clerk of the appellate court was not open, and the record was filed the following day. The sixtieth day thus fell upon Labor Day. The attorneys for appellee filed a motion to dismiss the appeal in the appellate court on the ground that the appeal was not perfected within the time required by statute, and because Labor Day is a holiday only for the purposes of negotiable paper. The appellate court of the first district dismissed the appeal taken by Brink's Chicago City Express Co. on the grounds above stated, without, however, rendering an opinion.

The brief of authorities presented to the appellate court in support of the dismissal of the appeal is as follows:

(1) The appeal from the granting of the temporary injunction not having been perfected in the appellate court within sixty days from the entry of the injunctional order must be dismissed.

Schillo v. Anderson, 51 Ill. App. 403; *Hartzell v. Warren*, 77 Ill. App. 274; *Lawyers Co-Op. Pub. Co. v. Chicago Law Book Co.*, 90 Ill. App. 425; *Alles Plumbing Co. v. Alles*, 67 Ill. App. 252, 254; *Coal Belt Electric Ry. v. Kayes*, 207 Ill. 632, 634, 635; *Fonda v. Jackson*, 203 Ill. 113; *Coons v. Frost*, 100 Ill. App. 303, 305; *Swafford v. Rosenbloom*, 189 Ill. 392; *Fairbank v. Streeter*, 142 Ill. 226; *Chicago Sash, etc. Mfg. Co. v. Shaw*, 39 Ill. App. 260; *Jones v. Dunton*, 5 Ill. App. 211.

(2) Though the sixtieth day (the last day upon which the transcript of record could be filed) fell on September 4, 1905, which was known and designated as Labor Day, still appellant did not have the next day, *i. e.*, September 5, within which to file such transcript. Labor Day is a holiday only under the negotiable instruments act, which nowhere attempts to regulate the holiday of courts, or other legal business on a holiday. Laws of Illinois, 1905, page 332; Ch. 131, sec. 1, sub. sec. 11, Hurd's Revised Statutes Ill. 1905; *Bradley v. Claudon*, 45 Ill. App. 326; *Glenn v. Eddy*, 51 N. J. L. 255, 257; *Handy v. Maddox*, 85 Md. 547; *Crabtree v. Whiteselle*, 65 Tex. 111; 20 Encl. Pl. & Pr. 1205.

(*Superior Court of Cook County. In Chancery.*)

Marette H. Curtis

vs.

Eugène P. Palmer.

(1903.)

1. **PARTNERSHIP—COMPENSATION OF PARTNERS.** Each partner is under obligation to devote his skill and effort to the promotion of the business of the firm. In the absence of special agreement, one partner is not entitled to any special compensation for services in prosecuting the partnership business, even though such partner has greater industry or ability than his co-partners.
2. **SAME—SURVIVING PARTNERS.** The same rule applies as to the services of a surviving partner as between him and the representatives of a deceased partner.
3. **SAME—EXTRAORDINARY SERVICES.** Where a surviving partner renders unusual or extraordinary services in preserving the partnership estate, or where the surviving partner devotes his whole time to the business and carries it on successfully, he is entitled to charge a reasonable sum for his services.

Bill for partition and accounting. Heard before Judge Jesse Holdom on exceptions of defendant to master's report.

For statement of facts see opinion.

John S. Stevens, for complainant.

McCordic & Sheriff, for defendant.

HOLDOM, J.:—

This cause is before the court on the exceptions of defendant to the master's report, embracing but one contention—that of compensation to defendant for collecting the rents of the property in question at the rate of five per cent on the amount of such collections.

In the year 1882 one Hotchkin and the defendant, Palmer, were partners, carrying on the business of dealers in cloaks, etc., and from the partnership moneys bought a leasehold estate for twenty years in the premises number 147 State street in the city of Chicago. In the year 1890 the partnership was dissolved and in 1896 Hotchkin died.

Palmer during the administration of Hotchkin's estate, paid one-half of the income to his administrator but did not inventory the same as partnership property. After the settlement of the estate of Hotchkin, Palmer continued to collect the rents, and disputes having arisen between himself and complainant, who, as an heir, acquired one-third of the interest of Hotchkin, she filed the bill herein for partition of the leasehold estate and for an accounting from Palmer. Since the filing of the bill the leasehold estate has ended by expiration of the term of the demise. The only matter now remaining for adjudication is the accounting, and the master has found that \$2,166.56 is due complainant, which sum has by order of court been paid into the hands of the clerk of the court awaiting the determination of the court as to whom the same shall be paid. Palmer claims out of the fund the sum of \$1,064.36.

The leasehold estate was a chattel real. After the dissolution of the firm of Hotchkin & Palmer they were tenants in common. They had, long prior to Hotchkin's death, ceased doing business, and the partnership had been formally dissolved. But treating the leasehold estate as partnership assets, upon the settlement of Hotchkin's estate his heirs and Palmer became tenants in common—although whichever contention is technically correct, the rights and duties of the parties are the same.

It is admitted that to the end of the administration of Hotchkin's estate Palmer kept charge and control of the leasehold premises, collected the income and paid the lawful charges in its maintenance, all without compensation or the making of any claim therefor. It is urged that Palmer rendered valuable service to the Hotchkin heirs, because, forsooth, he did not, as he might, sell the leasehold during the period of administration, which being a time of financial depression, the heirs would have been deprived of a large amount of money, as no adequate price could then have been obtained for it. Granted. What would be the result to Palmer? He must sell the whole, his own interest included, and he could not purchase at his own sale. He would suffer equally in such

a sacrifice. It was for their joint interest to obtain the best financial results from the property. A loss meant a loss to each and all alike, and a profit an equal benefit. There is no pretense of any express agreement to compensate Palmer for his services by any of the parties in interest as heirs of Hotchkin. A new tenant was procured after Hotchkin's death and a real estate brokerage firm paid a commission of \$500, which was borne equally by Palmer and the Hotchkin heirs. It is said that Palmer by his efforts saved the expense of attaching new fire escapes to the building; that he had the water taxes rebated; that he kept down the real estate tax upon the fee, etc.; and while undoubtedly all of this may be true, yet there was no more skill or labor required in working for the financial gain of his old partner's heirs than for his own.

This is not a case of unusual or extraordinary service rendered by a surviving partner to preserve the partnership estate or in carrying on a business successfully where the surviving partner devotes his whole time to it. In such a case compensation should be paid to such surviving partner and in the stating of the account he should be permitted to charge a reasonable sum for his services, as part of and a just expense for such extraordinary service. Such is the condition found in *Maynard v. Richards*, 166 Ill. 466. The service rendered by Palmer was the ordinary service in caring for the leasehold property in which he had a one-half interest until it determined by efflux of time. He took the burden upon himself voluntarily; he asked no heir's co-operation, neither did he request the assistance of the administrator of Hotchkin's estate during its administration. Upon the death of his partner he had the largest individual interest to protect, and it was only natural that, being familiar with the management and knowing its needs, and being personally acquainted with all the tenants, that he should continue in its charge and care.

In *Maynard v. Richards, supra*, Richards virtually created the fund in controversy, upward of \$100,000, by his work, energy and ability, extending over a period of six years, and it was out of the fund thus created by his own independent exertion, and after defeat in the lifetime of his partner, that

he was awarded compensation for such extraordinary and successful service.

In *Zell's Appeal*, 126 Pa. St. 329, Zill, thirteen years after his partner's death, discovered an old partnership claim which the court said "was not merely doubtful, but had no real foundation in either law or equity." Zill prosecuted the claim with energy for four years and succeeded in settling it for \$50,000, and for such remarkable energy and extraordinary service he was, as he ought to have been, allowed compensation in an accounting with the heirs of his deceased partner.

The foregoing cases exemplify what the law regards as extraordinary service entitling the surviving partner to an allowance therefor out of the fund recovered.

The services of Palmer in no sense come within the exception to the general rule which inhibits a partner "charging the firm or his copartners for his services in attending to the copartnership business unless there is a special agreement among the partners entitling him to do so. In the absence of such an agreement the law will not imply one from the greater industry or greater ability of any one partner. *Brownell v. Steere*, 128 Ill. 209. The reason of the rule is that each partner is under obligations to devote his skill and efforts to the promotion of the common benefit of the firm. *Lewis v. Moffett*, 11 Ill. 392. The same rule applies as to the services of a surviving partner as between himself and the representative of a deceased partner. *Maynard v. Richards*, *supra*.

Counsel for defendant, Palmer, contend that the leasehold estate was partnership property. Conceding such contention to be correct the foregoing authorities are in point and conclusive against Palmer's claim.

The exceptions of Palmer to the master's report will be and are overruled, and a decree will be entered directing the clerk of this court to pay the sum of \$2,166.36 heretofore deposited with him by order of court to complainant or her solicitor upon demand.

(Circuit Court of Cook County. In Chancery.)

Sigmund Oppenheimer, et al.

vs.

George Jacob Sayer.

(July 18, 1890.)

1. **CONTRACTS—RESTRAINT OF TRADE.** Covenants in restraint of trade generally are void, because contrary to public policy, but where the restraint is only partial, and the restriction is reasonable, such contracts are legal and will be enforced.
2. **SAME—CONTRACTS EMBRACING ENTIRE STATE.** The doctrine of the common law that contracts which embrace the entire kingdom or state are void, has been modified by the later decisions.
3. **CONSIDERATION—ADEQUACY OF.** At law a consideration of even one dollar is sufficient to support a contract. The court cannot inquire into its adequacy.
4. **SAME—COURTS OF EQUITY.** A contract good at law is good in equity. A court of equity will inquire into the adequacy of the consideration only when the contract is sought to be specifically enforced, and the inquiry of the court then is, whether a court of equity will lend its aid to enforce the contract.
5. **EMPLOYMENT CONTRACT—REASONABLENESS OF COVENANT.** An agreement by an employe not to engage in a particular business for three years after the termination of his employment is not unreasonable.
6. **SAME—RULES APPLICABLE.** On an application for an injunction to restrain an employe from violating a contract not to engage in a particular business for three years after the termination of his employment, the decisions governing courts of equity as to decreeing specific performance of contracts should control.
7. **SPECIFIC PERFORMANCE—WHEN NOT GRANTED.** If there are any circumstances which render the enforcement of a contract unfair, harsh, oppressive or inequitable, specific performance will not be granted.
8. **SAME.** Where an inexperienced employe was induced to sign a contract upon the representations that a fellow employe had signed a similar contract, which statement was false, and where the contract is unfair in that the complainants do not bind themselves to give employment to the defendant except from week to week, and do not bind themselves to teach him the business, or the secrets of such business, the court will not restrain a breach of such contract by injunction. In order to

have such contracts enforced they must not be unilateral or one sided. They must be fair and not harsh or oppressive.

9. SAME—COVENANTS NOT TO ENGAGE IN BUSINESS. The fact that all other business pursuits are open to an employe who has agreed not to engage in a particular business does not affect the reasonableness of the covenant. This is a good answer at law, but it is an unconscionable one in equity.

Bill for injunction to restrain an employe from breaking his contract not to engage in business. Bill filed January 19, 1889. Heard before Judge Murray F. Tuley. Case No. 70,972.

Statement of facts.

The bill alleged that the complainants were a partnership doing business in Chicago and New York; that they were engaged in the business of manufacturing and selling sausage casings and supplies of various kinds and descriptions, commonly used by butchers and others engaged in the business of buying, selling and manufacturing meats and meat products; that needing the services of salesmen to carry on their business they employed the defendant at his request, to act as salesman in their business at a stipulated salary, such hiring to continue as long as it was mutually satisfactory to the parties thereto, and that complainants agreed to instruct him in the said business and impart to him the names of their customers and other trade secrets. That they entered into a written contract with said defendant as follows:

“This agreement, made this eighth day of March, 1884, at Chicago, Illinois, by and between S. Oppenheimer and Company, a firm doing business in the City of Chicago, Cook County, Illinois, also in the City of New York, State and County of New York, parties of the first part, and George Jacob Sayer, party of the second part, Witnesseth:

“Whereas, The parties of the first part are engaged in the business of manufacturing and dealing in sausage casings and butchers’ supplies in which said business are certain trade secrets of great importance to the parties of the first part.

“And whereas, said parties of the first part have employed in said business said party of the second part and while so

employed may instruct him in said business, and impart to him such trade secrets,

“Now, in consideration of said employment and of one dollar to him in hand paid, the receipt whereof is hereby acknowledged, and of various other good and valuable considerations to him thereunto moving said party of the second part covenants and agrees to and with said parties of the first part and their legal representatives that he will never disclose or make known directly or indirectly to any person or persons any information or trade secrets concerning or in any wise relating to the business of the said parties of the first part and so acquired or learned by him as said employe or agent.

“Said party of the second part further covenants and agrees that within the following named countries, to-wit: the States of Connecticut, Georgia, Louisiana, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Illinois, Indiana, Michigan, Ohio, Wisconsin, Iowa, Minnesota, Tennessee, and the Province of Ontario in the Dominion of Canada, said party of the second part will not for himself nor for any other person or persons, directly or indirectly, engage in the business now carried on by said parties of the first part for the period of three years from the date of the termination of said employment.

“(Signed) Geo. J. Sayer.”

That at the time said contract was entered into the said defendant was a minor but upon the discovery of that fact by the complainant the said defendant signed a confirmatory agreement upon the attaining of his majority.

That in December, 1888, the said defendant left his employment of his own free will, and such hiring thereupon terminated; that thereupon said defendant entered into a partnership with one Nicholas Wolf in the city of Chicago for the purpose of selling and dealing in sausage casings and butchers' supplies, and thereafter did engage in such business in violation of his agreement, and attempted to deal with the customers of complainants in the states of Illinois and Wisconsin.

That while in the employ of complainants said defendant

traveled as salesman in the states of Illinois, Michigan, Minnesota and other states, and complainants believe that defendant will attempt to engage in business in said states and sell to the customers of complainants, and that said defendant has acquired a knowledge of the customers of complainants which information he could not have acquired except in the employ of complainants, and that such knowledge constitutes trade secrets in the business of complainants.

- That the damages which complainants will suffer by reason of defendant's breach of his contract are difficult and almost impossible of ascertainment, and complainants will suffer irreparable injury; that defendant has no property and is not worth more than \$2,000.00.

The prayer of the bill was that the defendant be restrained "from engaging either on his own account, or as salesman or clerk or other agent for another, or in any way, directly or indirectly in the business of buying and selling sausage casings or butchers' supplies in the states of Illinois, Wisconsin, Michigan, Ohio, Missouri, and Minnesota or either of them, or with any firm or corporation doing business or to do business in the same line of trade, business or manufacture in the said states or any of them until the 24th day of September, 1891."

A preliminary writ was issued in accordance with prayer of the bill. The defendant answered, proofs were taken and the case was heard on final hearing. The defenses interposed were that, first, that the contract was procured by fraud, and second, that it was contrary to public policy and therefore void.

The answer which was sworn to set up the following: "This defendant says that he was born on the 23rd of April, 1864; that at the time of the signing of said contract, he was a minor, but the fact of the minority was not spoken of at the time of the signing of said contract.

"This defendant further answering, says that on or about the 10th day of April, 1886, after having been in the employment of said firm continuously, he signed a certain document, called in said bill a confirmatory and supplemental contract,

but whether said contract is in the words and figures as stated in said bill of complaint, this defendant is not advised, except as stated therein, because this defendant was not furnished with any copy of said contract.

“This defendant avers that the circumstances surrounding the execution of said supplementary contract are as follows: Said Oscar Aberle accidentally became aware of the fact, through conversation between this defendant and said Aberle, that this defendant was a minor at the time when he signed the first document set forth in said bill of complaint. He thereupon immediately insisted to this defendant that it was necessary that this defendant sign another contract with said firm, by reason of said minority, to which proposition this defendant objected, and he was thereupon informed by said Aberle that such was the rule of the house, and that this defendant must sign the contract, and he gave this defendant to understand, and defendant so believed from such conversation, that unless he would sign such contract he would lose his position as an employe of said firm. This defendant was then ready to go out on the road and attend to his usual business, but by reason of the refusal of this defendant to sign said contract, he was kept around the office of said firm, doing nothing, and during said time he was constantly being persuaded by said Freund and said Aberle to sign said contract. This defendant, during said conversation was informed by said Aberle that all other employes in the firm had signed such contracts, whereupon this defendant asked said Aberle and Freund whether one Nicholas Wolf, who was then and always had been a friend of said defendant, and upon whose advice and judgment this defendant was in the habit of relying, had signed a like contract, to which question said Aberle and Freund replied that he had. Said Nicholas Wolf was then absent from the city of Chicago and could not be consulted by this defendant as to the advisability of signing such contract, and this defendant did not consult any one experienced in such matters, whether to sign such a contract, and this defendant in order to continue in said employment, and implicitly relying on the facts stated to him that other em-

ployes of said firm, and particularly said Nicholas Wolf had signed a like contract, this defendant was induced by said Aberle and Freund to sign said contract, but he was then informed by said Aberle at the time of said signing, and before he consented finally to sign the same, that it was only a matter of form, that it would amount to nothing, inasmuch as said firm could not stop this defendant from going elsewhere, and he then referred to the fact that one John B. Rucker, formerly a traveling salesman of said firm, was then with an opposition firm in spite of a like contract signed by said Rucker with said firm. In view of these explanations and representations, and relying upon them, this defendant signed said contract and continued in the employ of said firm till the last few weeks of December, 1888, when said employment was terminated.

“This defendant further answering says that at the time of the signing of said second contract, the first contract was not read by this defendant, nor was it read to him by said complainants, or by any of them, nor did this defendant have in mind the particular provisions of said first contract signed by him in 1884, and this defendant while at that time inexperienced in business affairs, had his anxiety quieted by said complainants by the statement that said signing was a mere matter of form and amounted to nothing anyhow, and that such impression was upon the mind of this defendant when he went into partnership with said Nicholas Wolf, as hereinafter more fully stated.”

The allegations of the answer on the subject of public policy were as follows:

“This defendant further says that the business of buying and selling butchers’ supplies and sausage casings is not controlled by said firm of S. Oppenheimer & Co., but is an extensive business participated in by over ten firms in the city of Chicago, controlling the same territory which is controlled by said S. Oppenheimer & Co.; that a large number of persons are in the business of selling butchers’ supplies and sausage casings, such as the various packers of the city of Chicago, located at the stock yards, in the town of Lake; that

there is a large competition in said trade at the present time, and has been for several years past, and said competition is increasing by the location of various houses engaged in the same line in various western cities, and when this defendant engaged in said business in copartnership with said Nicholas Wolf, he was willing to take his chances in said competition with new and old houses and do the best he could under all circumstances for the purpose of supporting his family.

“This defendant further answering says that he has no other business except the business herein described, out of which he could make a pleasant living, and that he is in danger of losing his livelihood, and perhaps the benefit of his partnership agreement with said Nicholas Wolf, if said temporary injunction be continued.

“This defendant further insists that there was no consideration for such contracts, or either of them; that even if there was such a consideration, said consideration was inadequate, inequitable, and illegal, and therefore void in law and equity.

“This defendant further says, that during his entire employment with said firm he was at no time engaged in the manufacture of sausage casings; that at the beginning he was engaged principally in the sale of sausage casings; that thereafter, in addition, at the request of said firm, he sold butchers' supplies, which latter term comprises butchers' tools, fixtures, engines and boilers, water motors, refrigerators, tanking outfits, safes and everything which may be used in slaughter-houses and butcher shops; that such butchers' supplies, in more or less quantity, are also kept in every hardware store in this country, and are commodities handled in other branches of business; that sausage casings are also handled in large quantities for the purpose of sale, by packing establishments engaged in the killing of domestic animals.

“* * * That this defendant insists that the provisions of said agreement, set forth in said bill of complaint, are too indefinite and too broad, even if otherwise legal, to receive the countenance of a court of equity; and this defendant insists that it is his right to be relieved from said inequitable

and illegal contract, and that he be relieved from the injunction issued by this honorable court. * * * ”

Prussing & Hutchins, solicitors for complainant,

Moses & Pam, solicitors for defendant.

TULEY, J.—

The complainants, doing business in New York and Chicago, selling sausage casings, butchers' supplies, meat and meat products, in 1884 employed the defendant, then about twenty years of age, as a traveling salesman, at a salary of seven dollars per week and one per cent. upon all sales made by him; and a few days after procured from the defendant a written agreement, in substance, that in consideration of such employment and of one dollar and other good and sufficient considerations, not to make known any information or trade secrets relative to the business of complainants, and that neither in Illinois and eighteen other named states, nor in the province of Ontario, Canada, would he, directly or indirectly, engage in the said business for the period of three years from the termination of his employment.

In 1886, complainants having discovered that the defendant was a minor when he signed the agreement, obtained a new agreement or contract confirming that made in 1884.

In December, 1888, defendant left the employment of complainants and soon thereafter entered into a partnership with one Wolf in the city of Chicago and commenced the business of dealing in sausage casings and butchers' supplies.

Thereupon, on the 19th of January, 1889, this bill was filed to restrain the defendant from carrying on such business in Illinois, Wisconsin, Michigan, Ohio and Minnesota, being the states in which defendant had done business as a traveling salesman for complainants.

It appears to be admitted that the first contract is not binding on defendant by reason of his being a minor at the time of its execution, unless the confirmatory agreement is binding upon him.

Defendant alleges fraud of complainant in obtaining the execution of the confirmatory agreement of 1886.

Much evidence was taken which is conflicting and irreconcilable. While there is some evidence tending to show misrepresentations made to defendant to induce him to sign the agreement, there was none which in my opinion was of so material a character, or which was so controlling in inducing defendant to sign the confirmatory agreement as to make the contract void for fraud. It is contended that the evidence shows that at least one hundred and one dollars was paid defendant as an additional consideration for his signing the last agreement.

I find from the evidence that the defendant signed the same under a threat of discharge and received no consideration other than a continuation of his weekly employment and probably the one dollar mentioned in the agreement.

The defendant contends that the contract is in restraint of trade and therefore contrary to public policy and void. Covenants in restraint of trade generally are void because contrary to public policy, but where the restraint is only partial, the consideration for the agreement is a good consideration, and the restriction is reasonable, such contracts are legal and can be enforced.

The doctrine of the common law that contracts in restraint of trade which embrace the entire kingdom or state are void, has been much modified by the later decisions of the courts.

Justice Bradley in *Oregon Steam Navigation Company v. Winsor*, 20 Wallace, 64, 67, well claims that "This country is substantially one country, especially in all matters of trade and business, and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular state," and that "Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered."

In the modern method of doing business, by means of traveling salesmen, a business ceases to be local or confined to any one state, but the whole territory traversed by the traveling salesman becomes the territorial limits of the busi-

ness. A covenant not to do business within such limits may not be any more against public policy than, formerly, a covenant not to do business in a certain town or city.

The methods of modern convenience in the transaction of business have done away with the reason of the rule founded upon territorial limitations.

In the *Diamond Match Case*, 106 N. Y. 473, the covenant included all the United States except one. It was held valid. *Beal v. Chase*, 31 Mich. 491, is also a very strong case upon this point.

It is contended that the consideration, which was only an agreement to employ the defendant by the week at certain wages and the one dollar mentioned in the contract, was inadequate and therefore the contract is void.

At law the consideration—even that of one dollar—is a valuable consideration and sufficient to support a contract—sufficient to support this as well as any other contract. If the parties considered the employment and the one dollar a reasonable and adequate consideration, it is not for the court to say that it was unreasonable or inadequate. To hold otherwise it appears to me would be to make the contract rest upon the business capacity and intelligence of the court as compared with that of the complaining party. It is an old saying that the law does not attempt to give any man brains or business sense.

A contract good at law should be good in equity. The only time a court of equity will inquire into the adequacy or sufficiency of the consideration is when the contract is sought to be specifically enforced, directly or indirectly, and the inquiry of the court then is not as to the validity of the contract, but whether the court of equity will lend its aid to enforce it.

The restriction as to the length of time (three years) for which defendant bound himself not to engage in the business, is not unreasonable. I do not understand defendant's counsel as contending that it is.

The only remaining question is, should a court of equity give its aid towards the enforcement of this contract? It

appears to me that the decisions governing courts of equity as to decreeing the specific performance of contracts should control this case. The application of complainant to this court is that this court decree that the defendant specifically perform his contract by decreeing a perpetual injunction against his breaking it. In other words,—that he abstain from going into and doing the business which by the contract he agreed he would abstain from for three years. It is the only specific performance of the contract by the defendant which this court could decree.

There are no trade secrets in this business to be divulged, and it is only by the competition of the defendant in business that complainants can be injured.

Pomeroy, in his work on the Specific Performance of Contracts says:

“It may be laid down as a general proposition that if there is any circumstance or fact connected with the preliminary negotiation * * * with the relations of the parties or conduct of the plaintiff which renders the enforcement unfair, harsh or inequitable upon the defendant, such specific performance will be refused; and to produce such a result there need have been no intentional dishonesty or unfairness, although in a great majority of instances the design to overreach or obtain an undue advantage exists.” * * *

“The concealment, suppression or neglect to disclose any fact during the negotiation which, if known, could have reasonably affected the result, although not amounting to such fraudulent concealment as would furnish ground for a rescission, will induce the court to withhold its equitable remedy.” (Pomeroy, secs. 183, 184.)

In this case I found that in order to induce defendant to sign the contract, one of the complainants did represent to him that Nic Wolf, a fellow-employee, a friend of defendant and upon whom he was known to rely for counsel and advice, had signed a similar contract. This was false, and while not such a misrepresentation as would be material and enable the defendant to have a rescission of the contract, this court,

which abhors deceit and false representations, whether material or not, can not look favorably upon an application for the enforcement of a contract obtained by such means.

“Not only,” says Pomeroy, “must the agreement be fair and reasonable in its terms and its surrounding circumstances; it is a well settled doctrine that its specific execution must not be oppressive.”

That—“every unfair contract is unconscionable and hard.”

“The oppression and hardship, therefore, which fall within the scope of the doctrine may result from the unequal, unconscionable provisions of the contract itself.”

In this case the defendant, a boy of twenty, uneducated and ignorant to an extent that he could with difficulty read writing, applied for work to complainants, who employed him by the week at \$7 per week, and one per cent. commission upon sales. He is asked to sign this contract,, and without reading it, does so, or if he did read it, was scarcely capable of comprehending its meaning. Under this contract complainants do not bind themselves to give him employment beyond week to week, do not bind themselves to teach him the business or the secrets, if any, of such business, but exact from him a mortgage upon his liberty of action and practically upon his means of livelihood, for three years. If he should continue in the employment long enough to learn the business, he is made to agree in effect that for an employment for one week he will not pursue a certain line of business for a term of three years after his discharge. It is true he affirmed this contract two years or more thereafter, when of full age, but he did it under a threat of discharge and upon a false representation that his friend, upon whose judgment he relied, had signed a similar one. The consideration for the confirmatory agreement was the continuation of the same weekly employment, and one additional dollar. Is it fair, is it a reasonable contract as between men of large business and contract experience, educated and intelligent men, and a boy of twenty or twenty-two, ignorant, uneducated, seeking wages upon which to live? Is it fair that such men should exact

from such employe a covenant by which he surrenders for three years his "business freedom" as to following the business which may have required years to learn?

It is said, however, that all other business pursuits and trades were open to him. That is a good answer at law, but is an unconscionable one in equity.

I do not want it to be understood that no contracts of this nature will be enforced in equity. But in order to have them enforced it must appear that they are not practically unilateral, or all on one side. The employer must agree to do something, must give an adequate consideration; the contract must be fair, not harsh or oppressive, in order to obtain an injunction which will restrain a party's business freedom and which will operate more or less in restraint of trade.

It is alleged that the defendant is insolvent, and that in a suit at law the damages are not capable of ascertainment. The circumstances may give a court of equity jurisdiction to enforce contracts of this nature which are fair and reasonable, not one sided in their covenants, obtained in a fair, not oppressive manner, and not founded upon deceit or misrepresentations. But this is not such a contract, and the fact that the remedy is not adequate does not make it the duty of this court to enforce contracts which do not possess these qualifications, and the enforcement of which would be against equity and good conscience.

The complainants must seek their remedy at law, and the injunction herein granted must be dissolved and the bill dismissed for want of equity without prejudice to the complainant's legal remedy.

Defendant moved the court for leave to file suggestion of damages.

NOTE

A.

INJUNCTION TO PREVENT BREACH OF CONTRACT FOR PERSONAL SERVICES AND TO RESTRAIN EMPLOYEES FROM SOLICITING CUSTOMERS, DISCLOSING TRADE SECRETS, ETC. VALIDITY OF CONTRACTS, ETC.

Injunction will not lie to restrain an employe from working for

a rival concern in violation of his contract unless his services are unique and extraordinary. *Kessler v. Chappelle*, 77 N. Y. S. 285 (wine salesman); *Stone Cleaning & Pointing Union v. Russell*, 77 N. Y. S. 1049 (stone cleaning and pointing workman); *Jewelry Co. v. O'Brien*, 70 Mo. App. 432 (jewelry salesman); *Lithographic Co. v. Crane*, 12 N. Y. S. 834 (skilled lithographer); *Johnston Co. v. Hunt*, 21 N. Y. S. 314, 66 Hun, 504 (advertising solicitor). *Rogers v. Rogers*, 58 Conn. 356, 20 Atl. 467, 18 Am. St. Rep. 278 (cutlery salesman, agent and manager); *Burnley v. Ryle*, 91 Ga. 701, 17 S. E. 986 (insurance solicitor). See also vol. 4 Pomeroy, *Equity Jurisp.*, 3rd ed., sec. 1343; Pomeroy, *Specific Performance*, 2nd ed., sec. 24.

In *Universal Talking-Machine Co. v. English*, 69 N. Y. S. 813, 34 Misc. 342, it was held that equity would not enjoin an employe having special knowledge or skill, unless it was affirmatively shown that such skill cannot be supplied by others.

Injunction will lie where the services are unique and extraordinary. *Lumley v. Wagner*, 1 DeGex, MacN. & Gordon, 604 (singer); *Hoyt v. Fuller*, 19 N. Y. S. 962 (danseuse); *Duff v. Russell*, 14 N. Y. S. 134, 16 N. Y. S. 958, 133 N. Y. 678, 31 N. E. 1 (actress); *Daly v. Smith*, 38 N. Y. Super. Ct. 158, 49 How. Pr. 150 (actress). This decision contains a full review of the authorities. *McCaull v. Braham*, 16 Fed. 37 (actress). See note to above case on pp. 42-49. *Metropolitan Exhibition Co. v. Ward*, 9 N. Y. S. 779 (ball-player); *Pratt v. Montegriffo*, 10 N. Y. S. 903 (singer); *Carter v. Ferguson*, 58 Hun, 569, 12 N. Y. S. 580 (actor); *Canary v. Russell*, 30 N. Y. S. 122, 9 Misc. 558 (actress); *Fredricks v. Mayer*, 13 How. Pr. 566 (actor); *Philadelphia Ball Club v. Hallman*, 47 Leg. Int. 130, 8 Pa. Co. Ct. 57 (ball-player); *American Association Ball Club of Kansas City v. Pickett*, 8 Pa. Co. Ct. 232 (ball-player); *Montague v. Flockton*, L. R. 16 Eq. 189 (actor); *Cort v. Lassard*, 18 Ore. 221, 22 Pac. 1054, 17 Am. St. Rep. 1054, 6 L. R. A. 653 (acrobat); *Metropolitan Exh. Co. v. Ewing*, 42 Fed. 198, 7 L. R. A. 381 (ball-player); *Philadelphia Ball Club Limited v. Lajoie*, 202 Pa. 210, 51 Atl. 973, 90 Am. St. Rep. 627, 54 Cent. L. J. 446, 58 L. R. A. 227 (ball-player); *Grimston v. Cunningham*, L. R. (1894) 1 Q. B. D. 125 (actor).

In the cases of *The Columbus Baseball Club v. Reiley*, 25 Week. L. B. 385, s. c. 11 Ohio Dec. 272; *American Baseball & Athletic Exhibition Co. v. Harper*, 54 Cent. L. J. 449, and *Harrisburg Baseball Club v. Athletic Association*, 8 Pa. Co. Ct. 337, injunctions were denied in the case of baseball-players on the ground that the services were not unique and extraordinary. See also *H. W. Gossard Co. v. Crosby*, 109 N. W. 483 (Iowa).

In *Philadelphia Ball Club Limited v. Lajoie*, *supra*, it was held that to authorize an injunction, it is not necessary that the employe's services be of such a character that it is impossible to replace them; it is sufficient if they are of such a unique character,

and display such a special knowledge, skill and ability as to render them of peculiar value to the employer and difficult of substitution.

In *H. W. Gossard Co. v. Crosby* (Iowa, Oct. 1906), 109 N. W. 483, the authorities are reviewed at length and it is held that in the absence of an express covenant not to work for another in a contract for personal services, equity will not aid the enforcement of such contract by restraining the employe from working for others. It is also held that even where there is an *express* covenant not to work for others, injunction will not be granted, except where the services are special, unique, unusual and extraordinary, or of an intellectual character which render such services of peculiar value. In that case the defendant was employed to sell a front lace corset and to give lectures pertaining to physical culture. The services were alleged to be unique, requiring a cultured saleswoman of strong individuality, with good address and ability as a lecturer, which requirements the employe was alleged to possess. It was held that such services were not unique and extraordinary.

In *Brooklyn Base Ball Club v. McGuire*, 116 Fed. 782 (C. C. E. D. of Pa.), an injunction was denied in the case of a ball-player, for the reason that the contract contained a provision that the same might be terminated upon ten days' notice.

In *Welty v. Jacobs*, 171 Ill. 624, it was held that the manager of a theatrical company could not enjoin the proprietor of a theater from refusing to furnish his theater, stage hands, etc., nor from letting the theater to another company, as such a contract cannot be affirmatively specifically enforced.

In *Robertson v. Montgomery Baseball Ass'n*, 141 Ala. 348, 37 So. 388, it was held that a bill would not lie to restrain defendants from seeking an injunction to restrain complainants from playing baseball. See vol. 60 Cent. L. J. 93.

See also upon the subject in general note in vol. 90 Am. St. Rep. 646 and in vol. 54 Cent. L. J. 451.

As to whether an injunction will lie in the absence of an express covenant see *H. W. Gossard v. Crosby* (Iowa 1906), 109 N. W. 483, where the authorities are reviewed. See also *Butler v. Galletti*, 21 How. Pr. 465; *Welty v. Jacobs*, 171 Ill. 624; *Whitwood Chemical Co. v. Hardman*, L. R. (1891) 2 Ch. Div. 416.

In *Hahn v. Concordia Society*, 42 Md. 460, an injunction was denied where the employment contract provided for stipulated damages in case of a breach by the employe.

B.

SOLICITATION OF CUSTOMERS AND DISCLOSURE OF TRADE SECRETS. In *Cahill v. Madison*, 94 Ill. App. 216, it was held that equity would interfere by injunction to restrain an employe from attempt-

ing to take away or solicit the customers of his employer in violation of his contract.

In *Hoops Tea Co. v. Dorsey*, 99 Ill. App. 181, it was held that injunction would lie to restrain a solicitor and salesman from soliciting the customers of his employer in violation of his contract.

But in *India Tea Co. v. Peterson*, 108 Ill. App. 16, it was held, in a similar case, that an injunction would not be granted where the contract was otherwise unfair and unconscionable, or harsh and oppressive.

In *Thum v. Tioczynski*, 114 Mich. 149, 72 N. W. 140, it was held that one who is given employment by a manufacturer whose processes of manufacture, methods, and machinery, are kept secret from the public, upon the agreement that he will not use the information imparted to him, in the course of his employment, for his own benefit, or communicate it to strangers, will be enjoined from breaking his agreement. The case contains a thorough review of the decisions.

And in *Salomon v. Hertz*, 40 N. J. Eq. 400, it was held that an injunction would lie to restrain an employe from divulging certain processes of manufacture, in violation of his agreement with his employer. The injunction was denied in so far as it was sought to prevent the employe from making known where or from whom the employer buys his materials, or to whom he sells his goods, or the prices at which he buys or sells, in violation of his agreement. Such an agreement will be construed as limited to the term of service.

In *Harrison v. Glucose Co.*, 116 Fed. 304 (C. C. A., 7th Cir.), it was held that an employe would be restrained from violating a covenant not to divulge trade secrets, etc. A large number of decisions are referred to in the decision of the court.

C.

VALIDITY OF CONTRACTS NOT TO ENTER INTO SIMILAR EMPLOYMENT.

The rule (Point A, *supra*) that injunction will not lie to restrain an employe from working for a rival concern, unless his services are unique and extraordinary, apparently has no application, where the employe covenants that he will not engage in a similar business or in the service of a competitor for a reasonable period of time *after* the termination of his employment. Such a covenant is valid and will be enforced.

In *Carter v. Alling*, 43 Fed. 208 (C. C. N. D. of Ill.), it was held that a contract between a manufacturing corporation, whose business extends throughout the United States and Canada, and one of its traveling salesmen, who had been in its employ for several years, whereby he agrees not to enter the service of any business competitor of the corporation, for three years, after leaving its service, is valid, and an injunction was awarded. A large number of cases, both American and English, are reviewed.

But in *Ehrman v. Bartholomew*, L. R. (1898) 1 Ch. Div. 671, a traveler for the plaintiffs, a firm of wine merchants, agreed to devote the whole of his attention and time to the business of the plaintiffs, and not directly or indirectly to engage or employ himself in any other business with any other person than the plaintiffs for a term of ten years. The traveler having left the plaintiffs' employ and entered that of another firm, the plaintiffs moved for an injunction to restrain him from engaging in *any other business*, and from acting as a traveler for any other firm of wine merchants, during the term of ten years. *Held*, that the negative stipulations in the contract were unreasonable and ought not to be enforced, and that the application must therefore be refused.

It was held also that the plaintiffs might enforce those provisions of the contracts relating to the solicitation of plaintiffs' customers, or the supplying of such customers with goods, etc., and that in this respect the contract was severable.

And in *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348, it is held that an agreement not to enter a particular employment is valid where the contract is restricted to a particular business, but otherwise it is bad. And where it is not alleged that the defendant occupied a position of special confidence, or acquired knowledge of the complainant's business secrets and methods, which he may use so as to benefit a rival, and where the length of time the defendant remained in the complainant's employ is so short that he could not have acquired the slightest influence over the complainant's customers, the injunction will be denied.

It was also held that where an employe agrees that he will not enter the employ of any rival of his employer "in any capacity," this will be construed to mean in any capacity in the particular business carried on by the employer.

And in *Harrison v. Glucose Co.*, 116 Fed. 304 (C. C. A., 7th Cir.), it was held that a covenant by an employe not to engage in the same business during the term of his employment, within a radius of 1,500 miles from the city of Chicago, was not in restraint of trade, and would be enforced by injunction.

But in *Harding v. Glucose Co.*, 182 Ill. 551, a similar contract between vendor and vendee was declared void.

In *Underwood v. Barker*, 1 Ch. Div. (1899) 300, it was held that a contract in which the defendant entered into a covenant that he would not, for the space of one year after leaving his employment, carry on the same business as his employer, or enter into the service of any person, in the same line of business, in either the United Kingdom, France, Belgium, Holland, or in the Dominion of Canada, was a valid and enforceable contract, and not in restraint of trade, and that the breach of such contract would be restrained by injunction.

(Circuit Court of Cook County. In Chancery.)

The Werner Company

vs.

W. B. Conkey Company, et al.

(December 8, 1893.)

BUSINESS PLANS AND SYSTEMS—INJUNCTION AGAINST USE OF.

The complainants commenced issuing in serial parts a portfolio of sights and scenes of the world. These parts were issued and distributed under contract by certain newspapers in exchange for coupons clipped from such newspapers. This plan was originated by the complainants and proved to be a great success. The defendants thereafter issued a similar book and adopted substantially the same plan in doing its business. The parts were not copyrighted and the original pictures were purchased in the open market. *Held*, there being no copyright, trade-mark or trade name involved, that a court of equity would not grant relief, as there can be no proprietary rights merely in a plan of doing business.

Motion to dissolve injunction. Heard before Judge Oliver H. Horton. Injunction dissolved. For statement of facts see opinion.

Partridge & Partridge, A. M. Pence and Newman & Northrup, for complainant.

Moran, Kraus & Mayer, for defendant.

HORTON, J.:—

In this case of the *Werner Company v. W. B. Conkey Company, et al.*—motion to dissolve injunction—counsel will of course bear in mind that there is a very large record, that elaborate arguments continuing for several days were concluded last night, and that therefore the court has had no time to prepare a written opinion. Like most oral opinions it will probably be too lengthy. I think, however, I can express my views.

September 15th, 1893, the complainant commenced issuing in serial parts under the title “John L. Stoddard’s Portfolio of Photographs of Famous Cities, Scenes and Paintings,” the

book owned by the defendant entitled "Glimpses of the World, or photographs prepared under the supervision of John L. Stoddard." The book has, including the blanks, some 550 pages, and about 265 cuts, and is to be issued in sixteen parts.

October 28th, 1893, the defendant commenced issuing in serial parts under the title "Sights and Scenes of the World, a series of magnificent photographic views, embracing the world of nature and art," the book which it then owned entitled "Sights and Scenes of the World," which embraced some 700 pages, including the blanks, and some 345 cuts, and is to be issued in twenty parts.

This bill was filed November 27th. The mode of doing business adopted by complainant was to negotiate a contract with publishers of newspapers to furnish these serial parts and to furnish cuts and the matter for various advertisements in the newspapers. The "parts" are sold on what is known as the coupon system, by the newspapers. That is, a certain number of coupons cut out of a newspaper will entitle the holder of those coupons, by paying four two-cent stamps, to one of these parts. The complainant claims to have originated this "plan" of doing business. The defendant pursued substantially the same plan in doing its business. The plan has proved to be a great success. The sales by both parties are such as impress the court as being almost incredible. Some six or seven millions of these parts have been sold by the two parties up to the time of the filing of the bill; and the defendant sold inside of four weeks between three and four million copies on contracts. I do not understand they are all delivered yet. This shows that the scheme or plan or device—this mode of doing business—whatever you see fit to call it—has been a great success. Complainant commenced about six weeks before the defendant did. Originally both of the books were copyrighted. There is no copyright upon the parts as such, as I understand it. It is, however, conceded in this case, that there is no copyright involved on either side, that there is no trade mark involved on either side, and no trade name involved.

The complainant claims protection in a court of equity of a property right consisting of good-will, plan of doing business, mode of advertising, selling a book in parts on the coupon system through the newspapers, etc., making up what it calls its whole "plan for doing business." The similarity which it is claimed the defendant adopted aside from the general plan of doing business, and as furnished me by one of the counsel for complainant, is: 1, the color of the covers; 2, the number and size of the pictures; 3, the style of the pictures; 4, the number of pictures in each part; 5, style of descriptive matter; 6, quality of paper; 7, size of the sheets; 8, mode of advertising (A, full page; B, three columns; C, two columns); 9, by the payment of postage stamps; 10, issuing the same in series.

The complainant did not, and I think does not, claim to have originated the plan of procuring and printing in half-tones, etc., photographs of the sizes here used, nor of printing on both sides of the paper, nor of the descriptive words printed beneath the picture; nor is it claimed that the photographs from which these half-tone pictures are made were taken by, or at the expense, or under the immediate direction of complainant. The originals were purchased in the open market. It is evident from the book which has been offered in evidence here—entitled "Scenes From Every Land, over 500 Photographic Views"—that none of these features which I have just mentioned are new—strictly so. The cuts in that book are printed on both sides of the paper, are similar in size, have similar descriptive matter, etc. Schepp's book, which has also been offered in evidence, is in many respects very similar. It has a different size page or cut, but in many respects it is very similar.

In so far as complainant's claim is not based upon original plans or matter it cannot receive the protection of a court of equity. And if it be true, as argued by one or more of the counsel, that both of these parties are "pirates," using the word in a legal sense, no relief can be granted. The court cannot interfere at the instance of one imitator for the sole benefit of another. Defendant has nowhere used the same

imprint complainant has used. The imprints upon the complainant's works are upon the book, "Photo Publishing Company," and upon the parts, "Published weekly by Educational Publishing Company, Chicago." The imprint on defendant's book is "George W. Ogilvie & Company, Publishers, 334 Dearborn Street, Chicago, Illinois," and upon its parts, "W. B. Conkey, Publishers, Chicago." Nowhere is the imprint of complainant upon any of the books or productions of defendant. There is no evidence or indication upon the complainant's book or parts that it has any interest whatever in either the Photo Publishing Company or the Educational Publishing Company. There may be something in some of the "ads" about that, but I have not discovered it; nor is there any evidence as to whether the Educational Publishing Company or the Photo Publishing Company is incorporated, or is a firm. There is a statement in the bill, or it was stated in argument, I am unable at this moment to say which, that these are simply imprints that the complainant has put upon its publications.

There is no evidence in the case that any one has been actually deceived. That defendant adopted the plan and similarity of parts, similarity of advertisements and general plan of doing business, etc., can hardly be doubted. If defendant had a legal right so to do this injunction must be dissolved. This court cannot deal with moral rights, or obligations, or duties, nor can it deal with business morals or business ethics or business courtesies.

There can be no proprietary rights in a "plan of doing business" separate and distinct from any other matter. There cannot be any proprietary rights in simply a mode of doing business.

It is practically conceded on the part of complainant that its right to maintain this bill does not rest, and could not be maintained upon any one point of imitation. The right it claims lies in the fact that the defendant has adopted its plan as a whole by imitating the parts, so called, and the advertisement and the coupon plan, etc. I do not recall a case in the books in which an injunction has been sustained where there

was neither a trade mark nor a trade name (in either the name of the producer or the article produced, or place of production); where there was no evidence of any actual damage to complainant, or that any one has been deceived or defrauded by the alleged piracy. Without quoting it I will refer to 2 High on Injunctions, 3d ed., sec. 1086, as defining this principle substantially as I understand it to be in the books. A large number of authorities have been cited, and what little I can do in reviewing these authorities must be from memory, substantially so. Cases in 2 Abbott's Practice, N. S., 459 (*Matsell v. Flanagan*), *Enoch Morgan's Sons Co. v. Schwachofer*, 5 Abbott's New Cases, 265, and *Enoch Morgan's Sons Co. v. Troxell*, 89 N. Y. 292, are what are called the "Sapolio cases." In the one case the word "Saphia" was adopted in place of the word "Sapolio." These words resemble each other much more to the eye than they do to the ear. In the court below an injunction was sustained. One of these cases went to the supreme court of appeals of New York and was reversed. The same language substantially was used by the court in both of the *Nisi Prius* cases. The interference there was alleged to be in the size and form of package, that they were both wrapped in tin foil, that they both had an ultra-marine blue band around them with gold letters printed thereon, etc. They were substantially the same except the words "Sapolio" and "Saphia." But it appears in those cases that the manufacturers, Enoch Morgan's Sons, had been long using and had established this trade mark or trade name "Sapolio."

The case of *McLean v. Fleming*, 96 U. S. 245, is in regard to the manufacture or rather the mode of putting up "dressing" as it is called by some of the books—Dr. McLean's pills. There the court held that there was a great similarity in the red seal on top of the boxes, same size and kind of boxes, and same band around the boxes, the name being similar, etc., and held that these constituted a trade mark which had been pirated. The cases of *Estes v. Williams*, 21 Fed. 189, and *Estes v. Worthington*, 31 Fed. 156, were what are known as the "Chatterbox cases." Some years ago I had occasion

to know about those cases and was employed in connection with bills filed in this district against parties for pirating that work, or pirating by productions called "Chatterbox." Those cases, I think, if I recollect them correctly, turn almost entirely upon the word "Chatterbox" as a trade mark, as applied to juvenile productions. I have not read them for years. I think that is so—as a trade name or trade mark. In the Fairbank's Scales case that is reported in 14 Blatchford, 337 (*Fairbanks v. Jacobus*, Fed. Cas. No. 4,608), there was a very marked similarity, absolute reproduction, or substantially so. Yet the court held that it was not an infringement. There is the case of *Broham v. Bustard*, 1 Hemming & Miller, 447, which is known as the "Excelsior White Soft Soap case." There the infringement or piracy was enjoined upon the basis that "Excelsior" was a trade mark or trade name; that the owner had established a right to it and could not be interfered with, and that the defendant had pirated that name. Substantially the same is the "Birthday Text book" case, *Mack v. Petter*, L. R. 14 Eq. 431, 41 Law Journal Rep. Chancery 781.

Reference has been made to the Elgin Watch case which is reported in the Legal News of December 24th, 1892, page 142 (*Elgin Nat. Watch Co. v. Eppenstein*). I have some familiarity with that case. That opinion does not refer to all of the facts of course. A number of watch cases were produced having the mark "Elgin Watch Case" on them, and a large number of affidavits showing where dealers and purchasers had been actually deceived.

There are two cases in the supreme court in this state, the first being *Candee & Co. v. Deere & Co.*, 54 Ill. 439. That is what is known as the "Moline Plow case." Without attempting to review that case except from memory, the complainant claimed, I think, a trade mark or trade name in the words "Moline Plow." Something like that. I may not be technically accurate, but plaintiffs there had not always used that name on the plows which they had sent out, and the court held substantially that a mere declaration that they claimed it as a trade mark or name was not sufficient. That

is one feature of that case. The court also defined a trade mark, what it is, etc. I will not attempt to review these details, gentlemen. You are too familiar with them. The 116 Ill. 137, is the case of *Ball v. Siegel*. The difference there was in the name of the proprietor preceding the words "Health Preserving Corset," the one being "Ball's Health Preserving Corset," and the other "Schilling's Health Preserving Corset," if I remember correctly. There it was held that it was not a piracy, they not being sufficiently similar. These are all the cases that it seems to me necessary to refer to. I refer to them for one thing, to show that in every instance a trade mark or trade name was the point in the case, and to show also that there must be such a similarity as to amount to actual deceit or evidence that there has been actual fraud upon the public.

This is a very peculiar business. Neither of the parties sell directly to what we may call the consumers. There is no evidence that any proprietor of any newspaper has been deceived. No one claims that. The contracts which have been produced show that they specifically describe what the parties are buying, or what they are contracting to buy. These parts are not laid before a purchaser as books ordinarily are in a store where he might be deceived in picking up one for the other. They are not presented to the customer in that way at all. They are sold by a coupon system. Those coupons and the advertisements in regard to them do not in any way show this similarity that is urged here of color of cover, and all these various details. It is difficult to see how the public can be mislead or deceived as to a thing they never see so far as that deception might be based upon observation. They buy simply from the coupons, and they get what the coupons advertise are to be furnished. The main, or perhaps I should say the prominent thing in the complainant's "ads" and title page is the word "Stoddard," or the name "John L. Stoddard." Take the cover and title page of complainant's book, and the name "John L. Stoddard" is only inferior in prominence and size to the words, "Glimpses of the World." The printed cover of the complainant's parts, the first words on it,

except some of the smaller words as to the series, etc., are "John L. Stoddard's Portfolio of Photographs." On the inside of the back cover, substantially the most prominent letters are John L. Stoddard. His lectures and his ability are there described. Not only that but the first cut in the book is Stoddard's portrait, keeping the idea of "Stoddard" before the public. And it was undoubtedly a very taking thing, a very taking idea to keep it prominent. It is, perhaps, the most prominent thing in its "ads."

Take the first full page "ad." It commences, "A Trip Around the World with John L. Stoddard." That is kept prominent. There is a cut of him upon that full page "ad," on a pedestal of honor I think, or something of that kind, and "Stoddard" is kept forward all the way through. It strikes me as a very sagacious mode of advertising, very shrewd. The defendants, however, do not use that cut, nor the name "Stoddard" anywhere in any of their advertisements I think except the one that was charged to have been published by and with the cognizance or approval of the defendant in the Minneapolis Journal. The evidence here shows that the moment that was brought to its attention, the defendant repudiated it by wire and ordered it stopped and by letter notified the publishers that they must not use any such advertisement. This would negative the idea of an intention in that way to pirate this name.

There are some of the smaller features, perhaps, that I need not call attention to. The colors are undoubtedly substantially similar; whether it was intended to simulate or not, it has been done. But the title page of the parts is so very different that it does not seem to me that any book buyer would be deceived if he was looking at them. The defendant's "parts" have a large telescope which is a prominent thing on the cover, with parties looking through it, or purporting to do so. In the advertisements the defendant undoubtedly uses the same sizes with new matter in each issue of the paper. But it did one thing that the complainant did not. It issued what it calls a "Supplement," which is one of the full pages of one of the parts printed on both sides, showing the size and kind of cut, etc., at the top of which

is printed in the one now before me, "Sights and Scenes of the World. Supplement to the Detroit Journal, Detroit, Michigan, November 18th, 1893." All of them which have been shown to me are the same except the name of the paper and the date. That is a thing that is not adopted by the complainant.

In this kind of business neither of these parties can have any competitor in the same city or town under their mode of contracting. Now if this injunction is sustained, then no newspaper can issue or sell a similar publication in parts in any city or town where the complainant has made a contract. In other words, the complainant has a monopoly of the whole business. The plan of doing business, if subjected to the proprietary right and sustained as such, is a monopoly. It seems to me that complainant's claim may be called a "trade right" as well as any other name that I think of. It is new, but I am not prepared to say but that such a right might, under certain circumstances, be sustained by a court of equity. I do not, however, see how it can be sustained in this case.

A trade mark is defined by our supreme court in the 54th Illinois in the case of *Candee v. Deere*, and I will only read the syllabus now (54 Ill. 439). "A trade mark is the name, symbol, figure, letter, or device adopted and used by a manufacturer or merchant in order to designate the goods he manufactures, or sells, and distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry and enterprise. It must be so clear and well defined as to give notice to others. It must be attached to the manufactured article," etc.

Now a "trade right" must have some of the defining features, some of the rights or merits that underlie a trade mark or a trade name. In either case it must be adopted and used.

The plan of doing business being eliminated, there is nothing left to support this case that can be a matter of copyright or trade right. I see no cause but to conclude, as I have somewhat reluctantly, that this injunction must be dissolved.

(Circuit Court of Cook County.)

People ex rel. McCarroll, et al.

vs.

Henry J. Mohr, et al.

(June 16, 1902.)

1. **MANDAMUS NOT GRANTED TO COMPEL PUBLIC OFFICERS TO ENFORCE THE LAWS.** Certain residents of the village of Harlem presented a petition for a writ of *mandamus*, alleging that gambling, betting and gaming were going on within the limits of the village of Harlem, and particularly at the race track in that village, in violation of the laws of the state of Illinois and of the village ordinance of Harlem, and that the chief of police, the president of the village and the village board of trustees, though often notified of the aforesaid violations of the laws and ordinances, refused to enforce said laws and ordinances, and suppress gambling, betting and gaming within the village limits; a peremptory writ of *mandamus* was prayed for against the president of the village of Harlem, the trustees and the chief of police "commanding them and each of them that they perform their respective and co-operative duties of their respective public village offices of the said village of Harlem and take such action and institute such proceedings as are necessary to enforce the police laws and ordinances of the said village of Harlem, and the laws of the state of Illinois against gambling, betting and gaming within the limits of the said village of Harlem." *Held*, that *mandamus* was not the proper remedy, and that a writ of *mandamus* could not be issued for such a purpose, because for the court to undertake to exercise the power of controlling matters of this nature would be to ignore the other powers of the government, the executive and the legislative, and to usurp and put into the court's own hand all the powers given to all the officers of government. It would be practically to substitute the court for all other officers and would result in judicial tyranny.
2. **MANDAMUS WILL NOT ISSUE TO COMPEL PUBLIC OFFICIALS TO DO THEIR DUTY GENERALLY.** *Mandamus* is not issued to command a public official generally to do his duty and to comply with the law of the land. His duty is fixed by the statute; the statute commands and it is his duty to obey the commands of the statute. *Mandamus* can only issue to command the performance or the doing of a specific act, not that the officer shall perform all

his duties, or perform all the acts required by his office, but that he shall perform some specified act.

3. POWER AND DUTY OF JUDGE. It was never intended that a judge in a court of law should be the governing power. His duty is to construe the law, and administer it.

Petition for a writ of *mandamus*. Circuit court of Cook county, Gen. No. 228,408. Heard upon demurrer to the petition.

D. S. Wentworth, attorney for petitioner.

Frank Little and Moran, Mayer & Meyer, for respondents.

TULEY, J.:—

It must be conceded that a petition for *mandamus* of the scope, breadth and general purpose of the one now presented is an anomaly in the jurisprudence of this city. No case has been cited where a like writ was ever asked for, and no precedent furnished where a writ so broad in its scope or anything near it was ever granted. The decision, then, must be in regard to the petition now before the court, upon the general principles governing courts and governing the issuing of a writ of *mandamus*; it cannot be placed, as stated, upon precedents or any decisions directly in point.

Certain residents of the village of Harlem, property owners and voters, some half dozen in number, present this petition, the substance of which is that gambling, betting and gaming are going on within the limits of the village of Harlem, and, particularly, at and about the race track in that village, and that the criminal laws of the state and the ordinances of the village are being openly and publicly violated; that these petitioners, or some other persons, I believe these petitioners, notified the chief of police of the village of Harlem, also the president of the village and village board of trustees, that open and public gambling has existed during an entire day at the Harlem race track within the limits of the city of Harlem, county of Cook and state of Illinois, contrary to, and in open defiance of, both the laws and ordinances of the aforesaid village of Harlem, and of the laws of the state of Illinois.

“Therefore, to this notorious breach and utter disregard of the aforesaid laws and ordinances within and in the vicinity of the said Harlem race tracks and also to your neglect of duty in regard to the enforcement of the said laws and ordinances against gambling, within the limits of the said village of Harlem, your attention is hereby called.”

The petition prays for what? “That a peremptory writ of *mandamus* issue” against certain persons. The bare reading of the prayer of the petition will not only show that it is unprecedented in its prayer, but that it goes to an extent, as far as the exercise of judicial power is concerned, hardly dreamed of by any one. “Your petitioners pray that a peremptory writ of *mandamus* issue against Henry J. Mohr, president of the village of Harlem,” against the trustees (naming them), against the captain of police, “commanding them and each of them that they perform their respective and co-operative duties of their respective public village offices of the said village of Harlem and take such action and institute such proceedings as are necessary to enforce the police laws and ordinances of the said village of Harlem, and the laws of the state of Illinois against gambling, betting and gaming within the limits of the said village of Harlem.”

What it asks for is already commanded by the law of the land, and their village ordinances.

I am not aware that *mandamus* ever was issued to command a public official generally to do his duty and to comply with the law of the land. His duty is fixed by the statute; the statute commands and it is his duty to obey the commands of the statute.

The law regulating the writ of *mandamus* is clear that it can only issue to command the performance or the doing of a specific act, not that the officer shall perform all his duties, or perform all the acts required by his office, but that he shall perform some specified act.

Suppose I issue this general order or *mandamus* that they perform their respective and their co-operative duties, or that they take such action as is necessary to enforce the police laws and ordinances against gambling. Suppose the complaint

should be made after I issued that *mandamus* that it had been violated, for instance, that they did not co-operate to enforce the law against gambling; that the statute independent of their general duty as officials, specifically commands them to co-operate. How would I find that they had violated the *mandamus* of the court by failure to co-operate? Am I to exercise my judgment as to what each official should have done in the particular case by way of co-operating with the others? One official, for instance, heard that there was gambling in such a place. If he failed to go and report that to the chief of police, traveling probably miles to make the report that he had heard such a thing, would I punish him for having failed to co-operate?

The prayer is indefinite, the duty commanded is too general and too indefinite to be made the basis of an order of a court.

I am asked, too, to command them to institute such proceedings as are necessary to enforce the police laws and ordinances, the statutes of the state and the village ordinances; to institute such proceedings as are necessary. That does not command any specific act; it does not charge that they have neglected any specific act. Now, what would be a violation of that duty? If they failed to make a complaint when they should make it, or suppose that a police officer is brought up for contempt on the ground that he failed to arrest a man when he should have arrested him for gambling; affidavit is made by one of these complainants that he saw two men betting on the race track, and that he asked a policeman, who was standing by, to arrest those men, and that the policemen are engaged in protecting these gamblers. In such a case the reply of that policeman will simply be, if he is cited to this court for contempt, "I did not see him betting. I told the man to go and make his complaint and get out a warrant."

Is the court to determine in such a case that the policeman is in contempt of this court?

A man is charged with violating the village ordinance; the police are charged with seeing that violation. Does that call for the court to enforce that village ordinance by way of con-

tempt proceedings? To issue a general *mandamus* of this kind would be simply to substitute the court for the president of the board of trustees, for the village board, in the exercise of its legislative power. The court would be required to substitute itself for the legislative power of the chief of police; they would all be represented, dominated and controlled by the judge who sat upon the bench.

It was never intended that a judge in a court of law should be the governing power. His duty is to construe the law, and administer it.

But here it is charged that these officials do not perform their duties and should be required to show why they do not; why they do not enforce the laws against gambling and the ordinances against gambling.

No specific case was cited. It is not at all analogous to the cases cited by counsel for this petitioner, for instance, the case where the question was as to the validity of a special election, or as to the power of the court, rather, to enforce the giving of notice of a special election to be held by a corporation. There it was held in the general language of the court here that where an officer failed to do his duty, the court would make him do it. There is a case where a number of interests were involved, and a plain case, a specific duty omitted by the president or secretary to give notice of a special election affecting the stockholders' interests. It is that kind of special case that the writ of *mandamus* is intended to protect.

Other cases are cited, one from Missouri, one in this state (*People v. Mayor of Bloomington*, 63 Ill. 207), commanding the removing of a fence from a highway, but none of them justify the issuing of a broad *mandamus* compelling an officer simply to do his duty.

If the court is to go into that kind of business, the court then would subordinate to the judicial power and render unnecessary all executive, police and administrative officials, and constitute the judge and his bailiff the "whole thing."

If the principle of this petition is to be maintained, I could be called upon by any citizen upon proof that he had informed the mayor of the city that a certain house was used

as an assignation house or house of prostitution, and that the police had failed to suppress it, I could be called upon by any citizen to give the aid of the court, its judicial power, to suppress it. I might be engaged the year around in suppressing such institutions. I might be called upon to close up saloons that violated the midnight ordinance, those that violated the Sunday laws, and my entire time would be taken up in substituting contempt of court for complaint, warrant, indictment, and trial by jury.

To issue the writ asked for and to attempt to enforce it would be, in the language of one of the cases cited, *brutum fulmen*, it would bring the court into contempt for its utter failure and inability to enforce its own orders.

If I should issue a general order of this kind and then bring the president up for contempt, because he refused to revoke a license, his answer could well be that he did not believe the statement that was made to him that they had violated the conditions of their license; that he had no knowledge that they had done so. Or he might answer, and answer possibly under his oath,—because it is a question of doubt, whether he had the legal power to revoke a license on the unsworn statement of a citizen that the conditions of the license had been broken.

He might also reply that the revocation of the license is in the discretion of the president of the board and the town board, and that they did not consider it best to do so—it being in their discretion.

The remedy is utterly impracticable. It is very much like issuing an injunction against the violation of a criminal statute. If you can issue one against the violation of a specific statute, as has been done, why not issue an omnibus injunction against the violation of any criminal statute or any penal ordinance, and let the judge enforce the criminal laws by punishing by contempt?

It is a much more speedy way, it is argued. True, it is more speedy, but when a judge undertakes to enforce the criminal law by the process of contempt, he invades individual rights, he interferes with the grand jury, with indictment,

with the right of a party to be heard, and to have a trial by jury to determine his guilt or innocence.

This argument of the quicker remedy may be all right for effectiveness, but when we come to consider that when individual rights are invaded or personal property rights, there is practically an end to our free institutions.

If one of these complainants was carrying on a business which his neighbors, or some of them thought created a nuisance and this neighbor should apply to a court of law and ask for a *mandamus*, that he should not be allowed to carry on this business, or an injunction that he should not carry it on, and he would go into court, the reply would be, "If I am violating a criminal statute or if I am violating an ordinance, complain against me in the proper manner, as having violated the law, and let me answer. I am entitled to the right of trial by jury to see whether I am guilty or not guilty. I object to having my rights passed upon by a judge without a jury." He would think that his individual rights were infringed upon and that the judge who should undertake to stop his business, possibly tear down his establishment, without giving him all the rights allowed to him by law as to his person and property, with regard to trial by jury, was doing a thing that was not justified by the law of the land.

We have a statute here in this state which provides that every officer holding any public office, whether state, county or municipal, who shall be guilty of any palpable omission of duty may be punished by fine not exceeding \$10,000, and may be removed from his office of trust or employment.

If these parties have taken the position as alleged in this petition and show that they are blind to violations of the law and stubbornly refuse to perform their duties, then it is the duty of the citizens of the town of Harlem to make their complaint before the grand jury, and have them indicted for malfeasance in office. A few indictments or convictions of that kind would do a very great deal of good in this community.

It is a remedy provided by the statute; it is a remedy which preserves individual rights to these officers, their right

to a trial by jury, and it is a remedy which does not depend upon the whim or the caprice or the judgment of a single person in the shape of a judge.

The only other remedy I know of is a remedy which citizens too often neglect, and that is electing honest men to office who will perform the duties of their office.

It is neither the duty of a *court of law* to punish the infraction of criminal laws, nor to elect men to office who will perform their duty. I know of no other remedy than the ones which I have suggested.

For the court to undertake to exercise the power of controlling matters of this nature would be to ignore the other powers of the government, the executive and the legislative, and to usurp, put into the court's own hand all the powers given to all the officers of the government. It would be practically to substitute the court for all other officers, and would result in judicial tyranny. The demurrer must be sustained.

NOTE

Mandamus to compel public officers to enforce the Sunday laws. The above case was relied upon by the defendants in their briefs, and the conclusions followed by the Illinois supreme court in the case of *People ex rel. Bartlett v. Dunne, Mayor of Chicago*, 219 Ill. 346 (Feb. 7, 1906), where it was held that *mandamus* will not lie against the mayor of a city to compel him to close tippling houses on Sunday or to enforce observance of the liquor laws generally by forfeiture of licenses, etc., since it is not within the sphere and jurisdiction of a court to assume ordinary governmental functions.

In *State ex rel. v. Brewer*, 39 Wash. 65, 80 Pac. 1001 (May 16, 1905), it was held that *mandamus* will not lie to compel the sheriff and the marshal to enforce a state Sunday closing law against saloons.

In *State ex rel. Clark v. Murphy*, 2 Ohio Circuit Decisions, 190, it was held that *mandamus* would not be issued to compel the superintendent of police to enforce state laws prohibiting saloons from selling liquors on Sunday.

In *People v. Listman*, 82 N. Y. Supp. 263, an application was denied for a writ of *mandamus* against the commissioner of public safety of the city of Syracuse, commanding him to enforce Sunday laws.

Similar principles are announced in *Mitchell v. Boardman*, 79 Me. 469; *Alger v. Seaver*, 138 Mass. 331. In this connection see also:

State of Ohio ex rel. v. Police Board, 19 Wkly. Law Bull. 341 (Ohio); *Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855; *State of Oregon v. Livingston, Mayor of Portland, Ore.*, 67 L. R. A. 166; *State of Nebraska ex rel. v. Cummings*, 17 Neb. 311, 22 N. W. 545.

(Circuit Court of Cook County. In Chancery.)

The People ex rel. Maurice T. Moloney, Attorney General
vs.
Chicago Fair Grounds Association.

(August 14, 1895.)

1. **INJUNCTION TO RESTRAIN CRIME.** A court of equity has no jurisdiction to restrain the commission of a crime, nor to enforce moral obligations, nor can it rightfully interfere with the performance of an illegal act, merely because it is illegal, in the absence of any injury to property rights.
2. **INJUNCTION TO RESTRAIN NUISANCE AT SUIT OF PRIVATE INDIVIDUAL.** Where private individuals suffer an injury quite distinct from that of the public in general, in consequence of a public nuisance, they are entitled to an injunction and relief in equity.
3. **INJUNCTION ON APPLICATION OF ATTORNEY GENERAL.** The attorney general, on his own motion, in behalf of the state, may institute proceedings by information in chancery to prevent obstructions or to abate nuisances on the public highways, streets, bays or harbors, as citizens have in them a vested right of enjoyment and user; but the state, as father of the people, and guardian of public morals, cannot institute such action in the absence of property rights or other interests conferring jurisdiction.
4. **INJUNCTION TO RESTRAIN ULTRA VIRES CORPORATE ACTS.** A corporation can exercise only such powers and privileges as its charter confers; if it transcends its charter powers the state can elect to proceed at law to annul the charter or in chancery to enjoin it from acting *ultra vires*.
5. **CHARTER A CONTRACT—PROPERTY RIGHT OF STATE THEREIN.** If, as conceded, a charter is a contract between the state and a corporation, the former has such a property interest therein as will give a court of equity jurisdiction of the cause, to ascertain whether the facts charged in the information are true, and having acquired jurisdiction for any purpose, it may enjoin

such acts on the part of defendant as amount to infractions of the laws, although such acts may be criminal in their nature.

6. The defendant is a corporation organized under the laws of Illinois for the purpose of establishing and maintaining a driving park and race track, where running, trotting and other meetings might be held. It appeared that the defendant permitted during the races conducted by it, betting and wagering upon its premises upon the races, and licensed persons, clubs and bookmakers to engage in the business of making bets and wagers upon such races on its grounds and elsewhere. At the suit of the state by the attorney-general by information in the nature of injunction, *held* that the injunction should issue, and a motion to quash the writ issued should be denied.

For statement of facts, see opinion.

George Hunt and John S. Stevens, solicitors for complainant.

Richard Prendergast and J. E. Deakin, solicitors for defendant.

GIBBONS, J.:—

:On August 14, A. D. 1895, the solicitors in behalf of the people of the state of Illinois, applied to me, in chambers, for a preliminary injunction against the Chicago Fair Grounds Association, based upon a document in the nature of an information in chancery, signed by Hon. Maurice T. Moloney, attorney general, in behalf of the people of the state of Illinois.

It is alleged in the information that the defendant is incorporated under the laws of Illinois; that its capital stock is \$300,000; that the object of the corporation, as set forth in its charter is to establish and maintain a driving park and race track, where running, trotting and other meetings may be held, to develop the speed and endurance of thoroughbred horses, and to hold fairs, horse shows, fat stock exhibitions, and entertainments of all kinds at such driving park; that after its incorporation the defendant secured the control of certain lands near Harlem, in Cook county, and caused to be constructed thereon a racing track, grand stand, stables, sheds, betting booths, etc.; that all of said buildings are inclosed by a close fence which entirely surrounds the grounds of defend-

ant; that defendant offered prizes and premiums upon races, solicited entries of horses therefor, and by advertisements and otherwise invited the general public to attend the same; that, since the opening of the said grounds for the purpose of conducting racing thereon, the said corporation has permitted and allowed within its grounds, at all times during the races conducted by it, the making of bets upon the races so conducted and run by it, and has, generally, during the time of such races, further permitted the making of bets and wagers within its premises upon horse races, run at places and upon tracks other than the track of said corporation, and has licensed or otherwise knowingly and intentionally given and permitted, for a consideration, the privilege to persons and so called clubs, commonly known as book-makers, to engage in the business within its inclosure, of receiving and making bets and wagers upon such races so run upon its grounds and elsewhere; and has rented and leased to such book-makers its said booths for said privileges and purposes aforesaid, at and for the consideration of \$100 a day for each of such booths; and has, by its agents and employes, engaged in the like business of book-making, and of receiving and laying bets and wagers in and upon said premises on horse races; that said corporation, its officers and agents are now engaged in said business of renting and leasing its said booths and premises for the book-making and the betting purposes aforesaid, etc., followed by the usual allegations as to nuisances, and praying for an injunction restraining defendant renting or leasing its premises for the said last mentioned purposes, and restraining defendant, its officers and agents, from the laying of bets or wagers upon horse races and the making of books, etc.

The language of the information is substantially similar to that employed by the supreme court of the state in *Swigart v. The People*, 154 Ill. 284, wherein it is held that horse racing is a game within the meaning of section 127 of the Criminal Code, and that a place under the grand stand at a driving park used for the purposes of book-making and selling pools upon races is a gaming house.

Relying upon representations made at that time by Messrs. Hunt and Stevens, solicitors for the people, I considered the emergency such as to demand immediate action, and accordingly granted the writ *ex parte*, but afterward, on application of defendant, I suspended its operation until a full hearing could be had.

On motion made by the defendant's solicitors to quash the writ, the power and jurisdiction of the court to grant an injunction, are challenged, chiefly upon the ground that chancery can interfere to prevent the commission of a criminal act or to abate a nuisance, only in a case where property rights are involved. As against this contention, it is asserted, that while it is true that a private individual can only invoke the aid of chancery where he suffers a private injury or threatened wrong to his property and he has no adequate remedy at law, a different rule applies when the state in its sovereign capacity sets in motion the machinery of the law. To ascertain and to declare the law, is the *alpha* and *omega*, the beginning and the end, of a judge's duty; and if that duty impels the quashing of the writ directed against gambling within the defendant's inclosure I shall yield obedience to the law which is as binding upon the judge as it is upon the humblest citizen of the land.

In this state, the law and its machinery are ample to punish criminals committing any kind of crime, and should they go unwhipped of justice, it is owing to the dereliction of officers of the law. It is needless to say that the apathy and indifference of a large number of those whom we are pleased to enlist among our best citizens in respect to public affairs, are largely responsible for the frequent miscarriage of justice in our larger cities.

There is not perhaps in any other state or country today, a statute which is so ample in its provisions, so lucid in its language, so severe in its penalties against gambling as the Criminal Code of Illinois. Notwithstanding these facts, the people of this city as it would seem from the arguments advanced in this cause and the appeals made to the court to afford them relief, are as hopelessly in the toils of blacklegs and

gamblers, as if the law was powerless to punish and crush them.

The law is powerful. The means and methods which it provides for the punishment of criminals are certain, swift and severe, and these agencies, I doubt not, will be effectually employed, just as soon as an enlightened and aroused public sentiment strengthens the arms of the state's attorney, whose duty and purpose it is to prompt and press the administration of the criminal law.

In order to sustain the position which I am enforced to assume in this case, it will be unnecessary to quote at length from the adjudicated cases. An examination of the principles underlying the questions involved made with that exacting care and conscientious consideration which the merits of the controversy demanded, brings a keen sense and an acute appreciation of the grave responsibilities resting upon me. A judge can have no self-tinctured policy prescribing a course of action—can entertain no purpose save such as duty dictates—can know neither fear nor favor for friend or foe, and it is his peculiar province to deal with and determine the rights of persons and of property, his object and endeavor ever to be just and right, keeping within the sacred precincts of the law wherein there is ever punishment for wrong and protection for right.

The assumption of jurisdiction where it does not exist and the formulation of rules applicable to each particular case by a judge, would work the extinction of vested rights and the destruction of all constitutional guarantees, taking away all security for life, liberty and property under the law.

“If I were to ask you, gentlemen of the jury,” said Lord Erskine in defense of Paine, “what is the choicest fruit that grows upon the tree of English liberty, you would answer, security under the law. If I were to ask the whole people of England the return they looked for at the hands of government, for the burdens under which they bend, I should still be answered, security under the law; or, in other words, an impartial administration of justice.” (Libel Trial of Thomas Paine.)

It is unnecessary here to discuss questions familiar to laymen as well as lawyers, respecting the distribution of governmental powers, and the agencies through which these powers are to be employed and administered. Nor is it necessary to recall the manner in which the courts were ordained and their jurisdictions conferred, in order to show that civil courts are for the purpose of administering civil justice between litigants, as distinguished from that criminal justice which is meted out in courts especially provided for such procedures.

The origin and the growth of jurisdiction of the chancery court, like many other of our institutions, may be traced back to the Romans, but the office of chancellor acquired little importance in England until Matilda the First of the Plantagenets elevated to that position one who endowed the office with a character and celebrity it has never lost—the celebrated and saintly Thomas a'Becket.

From the introduction of this court in England to the present time every attempt made by it to encroach upon the ancient and inalienable rights of the subject as established and enforced in the courts in accordance with the principles of the common law, has been resented and repelled by the English people and invalidated by the British Parliament.

Sir William Blackstone in his Commentaries on the Laws of England pays this high tribute to that branch of the law designed for the prevention of crime, "and really," he says, "it is an honor, and almost a singular one, to our English laws, that they furnish a title of this sort, since preventive justice is, upon every principle of reason, of humanity and of sound policy, preferable in all respects, to punishing justice. This preventive justice consists in obliging those persons whom there is a possible ground to suspect of future misbehavior, to stipulate with and to give full assurance to the public, that such offense as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behavior." 4 Black. Com. ch. 18.

There is not to be found in the learned commentator's treatise nor in any other upon the laws of England, reference to a case where a court of equity undertook to enjoin the com-

mission of a criminal offense where property rights were not the foundation of the action and enjoining the offense a mere incident, whereby the rights of property might be protected and enjoyed. Nor is there to be found a case in the entire range of American adjudications, with the exception of liquor cases under special statutes of doubtful validity, in which a court of equity undertook to enjoin the commission of a criminal offense, or to prevent the continuance of a nuisance where the right of property was not the foundation of the action.

It is an elementary principle of equity jurisprudence that a court of equity has no jurisdiction to restrain the commission of crime, nor to enforce moral obligations or the performance of moral duties as such, nor can it rightfully interfere with the performance of an illegal act merely because it is illegal, in the absence of any injury to property rights. High, *Injunctions* (3d ed.), sec. 20; Morawetz, *Corporations*, sec. 1041; *The Debs Case*, 158 U. S. 564; *Cope v. Fair Ass'n*, 99 Ill. 489.

When private individuals suffer an injury quite distinct from that of the public in general, by consequence of a public nuisance, they are entitled to an injunction and relief in equity, which may thus compel the wrong-doer to refrain at once from his wrong-doing that inflicts injury upon the property of another. Story, *Eq. Jur.*, secs. 924a, 925, and cases cited.

The public highways, the streets of cities, the navigable streams, the bays and harbors are the property of the public and every citizen of the commonwealth, has in him a vested right of enjoyment and user, and it may be conceded that the attorney-general on his own motion in behalf of the state has the right to institute proceedings by information in chancery to prevent obstructions and to abate nuisances thereon, without showing special injury or damage as would be necessary in the suit of a private individual.

Thus far and no farther have courts ever gone, and the jurisdiction in such cases is based not upon the right of the sovereign as such, but upon the trust imposed upon the sovereign to conserve and protect these properties for use and enjoyment by the people.

It is contended that the state, as the father of the people and guardian of the public morals, may invoke the aid of chancery to prevent persons engaging in those questionable pastimes and vicious pursuits which corrupt and destroy the virtue and manhood of youth, bringing upon the whole community degradation and distress, but such is not the law, as a close analysis of cases, both English and American, will clearly show. When King or Commonwealth invokes the aid of courts, it is in a representative or trust capacity, as suitor and not as sovereign.

When James I conceived the notion that he would rule in England as monarch absolute, a plan was devised to compass his designs through the court of high commission. This court, established by Elizabeth had not been provided with any fixed rules, and from its decision there was no appeal. An attempt was made in furtherance of this plan, to subject all persons, lay and spiritual, lord and peasant to its jurisdiction and to give it cognizance of all cases.

Instead of bringing suitors before the court by a citation, a pursuivant was sent to the house of any person complained of and against, to arrest and imprison him. Lord Chief Justice Coke, supported by his brethren of the common pleas, whenever appealed to, checked the usurpations by writs of prohibition. In the hope that Coke would no longer oppose its arbitrary assumptions, he was offered the position of one of its judges, but he resolutely declined the sinister proffer. The high commission being silenced for a time Archbishop Bancroft suggested the notable expedient of "the King judging whatever cause he pleased in his own person, free from all risk of prohibition or appeal." Accordingly one Sunday the King summoned all the judges before him and his council, and when they were assembled, the archbishop thus began:

"The judges are but the delegates of your majesty and administer the law in your name. What may be done by an agent may be done by the principal, therefore your majesty may take what causes you may be pleased to determine, from the determination of the judges, and determine them yourself. This is clear in Divinity; such authority doubtless belongs to the King by the Word of God in the scriptures." Thereupon

Chief Justice Coke made answer, all the judges assenting. "By the law of England, the King in his own person can not adjudge any cause, either criminal, as treason, felony, etc., or betwixt party and party concerning his inheritance or goods, but these matters ought to be determined in some court of justice. * * *

"So the King cannot arrest a man as laid down in the Year Book 1 H. VII. 7. 4, for the party can not have remedy against the King. So if the King give any judgment what remedy can the party have? * * *

"The law is the golden met-wand and measure to try the causes of your majesty's subjects, and it is by the law that your majesty is protected in safety and peace."

These quotations fully answer the contention that the King or Commonwealth has any standing in court other than as a representative or trustee. It is true the rule prevails that the King or sovereign may sue the subject and that the subject can not sue the sovereign without his consent, but the reason for such a rule is so patent to the profession, that discussion or explanation of its purpose would be needless.

But it is said that Mr. Justice Brewer in the Debs case (158 U. S. 564) held that the sovereign may appeal to a court of chancery to prevent infractions of the law irrespective of any property rights involved. After discussing the property rights of the United States, upon which the case was already decided, he proceeds: "We do not care to place our decision upon this ground alone. Every government, intrusted by the very terms of its being with powers and duties, to be exercised and discharged for the general welfare, has a right to apply to its courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

Entertaining as I do, the highest respect for the distinguished jurist, and a strong confidence in the correctness of

his opinions, I am prompted to demonstrate that his pronouncements in that case referred to, are not open to the construction given them by counsel.

The language of Justice Brewer must be construed in connection with the facts then before the court. By long and ancient usage, every citizen of the United States was entitled, upon the payment or tender of the reasonable or customary charges, to be carried from place to place and from state to state, over the great commercial highways of the nation: was entitled to transact business with persons residing in every town and hamlet of the republic, through the medium of the postal service of the government. These privileges, so long and universally exercised, under legal protection and judicial sanction, involving, as they do, so much of the industrial and commercial interests of the people, have grown into valuable property rights, which each and every citizen should be permitted to avail himself of, or to enjoy without let or hindrance.

These rights are akin to the right of the citizen to the free and unobstructed use and enjoyment, in a lawful and customary manner, of the king's highway. Even if the decision of the Debs case was based upon these considerations, which it is not, it would be no departure from established principles of equitable jurisprudence as applied to cases where the state appeals to chancery to enjoin the continuance of a nuisance on the public highway. So that the paragraph quoted from the Debs case does not bear the construction contended for, nor was it intended by the distinguished jurist who employed the language, that it should.

Having pointed out the jurisdiction of a court of equity, together with its limitations in respect to what may be called preventive justice, I pass to the consideration of another phase of the case.

The defendant in this case is a corporation created by the state of Illinois. It is an artificial being. It differs in that respect from a natural being, possessing no inalienable right to enjoy life, liberty and the pursuit of happiness, considered as individual prerogatives. It enjoys no greater privileges than

those conferred by its charter. It has legal rights, property rights, and vested rights, but no personal or natural rights. Its charter is its letter-of-attorney, which is in the nature of a contract with the state, that it will exercise the privileges and enjoy the benefits conferred upon it conformable with the grant. If it does not, the state may petition the court for annulment of its charter, not as sovereign in the capacity which the grant was made, but as suitor in its own court.

If the defendant is transcending its charter privileges, the state has a choice of remedy. It may proceed at law to annul the charter or invoke the aid of chancery to enjoin defendant from acting *ultra vires* to the detriment of the public. If the charter be a contract between the state and the corporation, as is conceded, the state has such a property right therein as will enable a court of equity to take jurisdiction of the cause, to ascertain whether the facts charged are true, and having acquired jurisdiction for any purpose, it may enjoin such acts on the part of defendant, as amount to infractions of the law, although such acts may be criminal in their nature. *The Attorney-General v. Railroad Co.*, 35 Wis. 425, and cases cited; *Attorney-General v. Jamaica Aqueduct Cor.*, 133 Mass. 361; *Attorney-General v. Oxford, Worcester & W. Ry.*, The Weekly Reporter, vol. 2, page 330; Opinion of Lord Romilly, Master of the Rolls. And see the elaborate and scholarly analysis of cases bearing upon the question here involved by Mr. Chief Justice Howard of Indiana, in *Columbian Athletic Club v. State ex rel. McMahan*, 143 Ind. 98, 40 N. E. 914; also Beach on Inj., secs. 1344, 1345.

If the court finds that the acts done by the corporation are not detrimental to the public interest, although such acts are *ultra vires*, it may, in its discretion, refuse an injunction. *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; *Stockton, Attorney-General v. Central R. R.*, 50 N. J. Eq. 52, 24 Atl. 964. Upon the facts admitted in the case, so far as the purpose of this motion is concerned, a court could have no discretion, and the motion to quash the writ issued against defendant corporation is denied.

(Circuit Court of Cook County. In Chancery.)

Illinois Manufacturers' Association, City of Chicago, et al.
vs.
Chicago Telephone Company.¹

(January 7, 1902.)

1. **TELEPHONE COMPANIES—RATES FOR TELEPHONE SERVICE.** Where a municipal corporation grants to a telephone company the right to use the streets for the installation of its telephone service, and as a condition of such grant the telephone company agrees that it will not increase to its present or future subscribers the rates for telephone service then established, it is the duty of such telephone company to comply with the terms of such ordinance and furnish the service agreed to be furnished at the rates fixed by the ordinance.
2. **SAME—CHARACTER OF SERVICE—RATES.** Nor is it material that an improved service is furnished to such subscribers, or that such improvements were not in existence at the date of the passage of the ordinance. Having adopted the improvements it is the duty of the company as a public service corporation to furnish telephone service with all such improvements at the rates fixed by the ordinance.
3. **ORDINANCES—WHETHER PUBLIC LAWS OR PRIVATE CONTRACTS.** Such an ordinance is not a mere private or business contract between the city and the telephone company, but is an exercise of the sovereign or governing power of the state delegated to the city by its charter.
4. **ORDINANCES—PRACTICAL CONSTRUCTION—ESTOPPEL AND ACQUIESCENCE.** There can be no estoppel against the enforcement of an ordinance which is a public law, by reason of any practical construction placed thereon by the parties or by acquiescence in such practical construction.
5. **PAYMENT IN EXCESS OF RATE FIXED BY ORDINANCE—WHETHER VOLUNTARY.** Where a public service corporation exacts charges in excess of those allowed by law, the payment of such charges is not regarded as voluntary, nor is the making of any protest or objection necessary in order to recover back such excess charges.

¹ The decision of Judge Tuley was affirmed by the appellate court on appeal. See 106 Ill. App. 54. See also *People ex rel. City of Chicago v. Chicago Telephone Co.*, 220 Ill. 238.—Ed.

Motion for preliminary injunction. Heard before Judge Murray F Tuley on bill, answer, documentary evidence and supporting affidavits. Gen. No. 221,614.

Moran, Mayer & Meyer, solicitors for complainants.

Charles M. Walker, corporation counsel for city of Chicago.

Holt, Wheeler & Sidley and *J. J. Herrick*, solicitors for defendant.

TULEY, J.:—

This is a bill filed by the Manufacturers' Association and a number of other lessees of, and subscribers for, telephone instruments, equipments, and service, carrying on various kinds of mercantile and other business in the city of Chicago, and on behalf of all others similarly situated, who are willing to become complainants and share the expenses of litigation, against the Chicago Telephone Company, an Illinois corporation, which, it is alleged, enjoys a practical monopoly of furnishing telephone service and operating telephone lines in said city.

The bill alleges the due passage by the city council of the city of Chicago of an ordinance on the 4th of January, 1889, granting to the defendant telephone company permission and authority to construct, maintain, repair and operate in the public streets, alleys, tunnels and public ways of the city, for a period of twenty years, lines of wires or electrical conductors for the transmission of sounds and signals, only by electricity and containing certain provisions as to the placing of wires underground in a certain specified district, and as to the erection of poles upon the streets in the remainder of the city, etc.; and among other things providing for the payment into the city treasury of 3 per cent, annually, of the gross receipts from the telephone business done in the city; and also that said company, during the term for which the ordinance was granted, "shall not increase to its present or future subscribers the rates for telephone service now established, and provided also that, with the acceptance hereinafter required, there shall be filed by said company a schedule showing the rates charged for telephone service at the date of the

passage of this ordinance, within the limits of the city of Chicago."

This ordinance also provided for the filing¹ of an acceptance with the city clerk, and a bond of \$10,000 with the city of Chicago, within thirty days after the passage of the ordinance.

On January 8, 1889, the Telephone Company filed with the city clerk its acceptance of said ordinance and the bond required thereby.

The bill alleges that the company has obtained a monopoly of the telephone business in the city, and controls the telephone business between its lessees in the city, and also with persons over the long distance telephone, and sets forth at length the necessity of the telephone as an instrument of business.

The bill also alleges that on said January the 8th the company, in pursuance of said ordinance, filed with the clerk a map and schedule of rates charged by the company within certain limits and districts of the city shown upon said map, from which it appeared that within certain blue lines upon said map, which embraced the north division of the city south of North avenue (except Goose Island); and the west division east of Western avenue and south of West Division street and north of West Twenty-first street and the south branch of the Chicago river; and the south division, except the territory east of Clark street and south of Thirty-first street, and the forks of the south branch of the Chicago river—the Telephone Company furnished to all subscribers and lessees desiring a business connection, a telephone business connection at the rate of \$125 per annum, and furnished residence telephones and service at the rate of \$100 per annum.

The bill alleges that complainants are within said blue lines, and that notwithstanding its legal obligation and duty in that regard, the said company, after accepting said ordinance as set forth, commenced by various pretexts and pretenses to increase to persons taking telephones and service within said territory, the annual rental therefor, and required such persons to enter into a contract to lease, setting out the terms and conditions upon which telephones and service would be fur-

nished; and that, being unable to obtain telephone service except from defendant, and the same being indispensable to the proper conduct of their business and affairs, the complainants, respectively, were compelled to sign pretended contracts or leases by which they agreed severally to pay the defendant company \$175 for business telephones, or \$50 per annum more than the amount authorized to be charged by said ordinance; that this exaction of said excess of \$50 per annum was beyond the power and authority of said Telephone Company and is against public policy, and that, under the circumstances, the agreement to pay such excess is not binding upon complainants, respectively.

The bill alleges that defendant pretends that the telephone apparatus and appliances and circuit, which it furnishes at said rate of \$175, is a better and more efficient system and service than was in operation at the time of the passage of the ordinance; that while it may be true it is superior to that of 1889, it is because experience and invention have increased the efficiency of telephone instruments, conductors, wires and circuits; that the circuit in use at the passage of the ordinance was what is known as a "ground circuit," and that with the multiplication of electric wires and various conductors of electricity in the city of Chicago, the furnishing of telephone service over such a ground circuit became and is utterly impracticable, and metallic circuits had to be adopted and put in use by the Telephone Company in order to keep abreast with the progress in telephone service and appliances; and also because with any other than metallic circuits the telephone service would be insufficient and practically useless.

The bill alleges that the cost of furnishing an efficient service has been rather reduced than increased, and that while \$125 per annum may have been at the period of the passage of the ordinance a reasonable rate, it is now very much in excess of a reasonable rate for such service, but offers to pay the same until by legal authority it may be reduced. The bill alleges that the company has compelled users of telephones for residence purposes to pay (illegally) \$125 per annum, or \$25 more than provided in said ordinance; and al-

leges threats made by the company to cut off telephone service if the alleged illegal exactions are not paid; that it was not until within the last few weeks before filing the bill that complainants became aware of the fact that the excess of \$50 and \$25 per annum, respectively, was an illegal exaction, and that the complainants had not since paid the same.

The bill prays for a decree that the rental provided by the agreements or leases exacted by the defendant from complainants, in so far as it exceeds \$125 per annum, to-wit: Fifty dollars per annum may be decreed illegal and not binding, and that the defendant is bound to furnish telephones for business purposes, and with services such as are enjoyed by the complainants for and at the rate of \$125 per annum; and for an injunction restraining the company from collecting any greater rental, and from refusing to furnish telephones and telephone service at the rate fixed in said ordinance upon any pretense or pretext whatever.

The answer of the defendant admits the allegations of the bill as to the passage of the ordinance and its acceptance; that it had no right to lay its conduits or occupy the streets, etc., of Chicago without the consent of the city, and that since its passage it has constructed and maintained its poles, wires, etc., in and under the streets, etc., of the city by virtue of the consent of the city contained in such ordinance.

The answer denies that it has obtained a monopoly of the telephone business, and sets out several ordinances passed in favor of other companies, and alleges that one of them, before the filing of the bill, had commenced the work of construction, and obtained contracts to furnish telephone service to different subscribers.

Admits it maintains and operates a telephone system, not only in Chicago, but also in various neighboring cities, towns, and villages in Cook and seven nearby counties of Illinois, and two in Indiana.

Alleges that it does not own the telephones used by it, but that they are leased and licensed to it by the owner.

Admits that its earnings are as stated in the bill, and that it pays a dividend on its stock of twelve per cent. per annum;

admits that under the ordinance it is bound to furnish telephone instruments connected by wire with its exchange at \$125 per annum for business purposes, and \$100 per annum for residences, but denies it was its duty to furnish to complainants or others "equipment, telephones and service agreed to be furnished and furnished under the special contract 'Exhibit B' to the bill of complaint."

Denies the alleged pretexts and pretenses for increasing its rates, and that complainants were compelled by it, in order to obtain telephone service, to sign the contracts or leases, "Exhibit B," for the payment of \$175 per annum, but alleges the same were freely and voluntarily entered into by the complainants.

Denies that the said contracts or leases ("Exhibit B") are opposed to public policy, or in violation of the terms and conditions of the ordinance.

The answer describes the poles, wires and earth connections and circuit in 1889, and the instruments used, the magneto bell and hand generator, or small dynamo, used for connection with the signaling, the hand telephone and one transmitter called the "Blake" transmitter; alleges that such system, with some improvements, has been, and is still, furnished by the defendant to those desiring it, ever since the passage of the ordinance.

Alleges that the long distance telephone had not reached Chicago in 1889, and was then only in a comparative state of development, and after the date of the ordinance, it was gradually developed until communication could be had by it over one thousand miles of wire, and that in 1893 the American Telephone Company had extended its long distance telephone from New York to the city of Chicago; that such long distance system was wholly different from that in use by the defendant and other companies, which maintained local systems by means of grounded circuits and other equipments described as in use in 1889. That the long distance had a wholly different circuit, and required two wires instead of one, consisting of copper, and differently arranged.

Alleges that the entire equipment, connecting wires, hand

telephone transmitter, dynamo cells of battery, switch board, and its connected appliances were wholly different; that the local system and equipment of 1889 was sufficient for local exchange or toll service for a distance of forty to one hundred miles, and could not be used practically for communication over the long distance, by making connection with it, for over one hundred miles; that the American Telephone Company installed its exchange in the same room with the defendant's exchange, and placed long distance telephones in subscribers' places of business with necessary appliances, under a charge of \$96 per annum; that the subscribers of defendant, who did not have long distance telephones, had to go to long distance toll stations; that thereupon a demand sprang up for telephone equipments, which the subscribers of defendant might use either for long distance business or for local service.

Alleges that subscribers could have the old service of 1889 improved, or the combined local and long distance, and that sometimes subscribers had both kinds.

The answer sets out at great length acts of the city of Chicago and of complainants, which it contends amounts to a practical construction of the ordinance of 1889, to-wit: that it, the defendant, had a right to make the special contracts and require the additional pay for the improved service.

That, relying upon the recognition of defendants' rights to make such special service and contracts, and the acquiescence of the city of Chicago and of the complainants and of the general public, it had from time to time expended large sums of money in order to enable it to provide such special service and equipments in accordance with such contracts.

The answer alleges that it has given to grounded line subscribers the most available inventions relating to telephone service by grounded lines and Blake transmitters; that it has removed poles from the streets and put wires under ground and laid cables containing copper wires in connection therewith at a vast expenditure.

That to enable defendant to meet this demand of the public, the defendant, in 1893, devised such instruments and equipments and made such arrangements with the American

Telephone Company as enabled it to furnish the combined service under which the defendant has furnished such service to complainants under the terms of such contract, agreeing, however, to guarantee to the American Telephone Company payment of all tolls for the use of its lines and to collect the same.

The answer sets out what was necessary to be done, the substitution of new instruments of greater power, of a complete metallic circuit instead of the ground circuit, the remodeling of its switch board, the new metallic trunk lines in place of the old, which were made noisy by induction, etc.

That it was at this time the special contract ("Exhibit B") with complainants came into use and has continued in use since that date.

That in 1901 the defendant company was operating 36,000 telephones in the city of Chicago and the long distance had been extended to 26,000 cities, villages, etc., and subscribers of defendant, entering into this special contract, could reach all of these places; that defendant has relieved subscribers to the grounded line telephone from the turning of a crank or ringing of a bell, and from the interruption of defendant's employes for the purpose of restoring or inspecting the call battery located on subscriber's premises, by adopting and giving subscribers the benefit of the common battery system, and the answer sets forth in detail the advantages of such additions or improvements, including the substitution of copper wire in part and placing same in cables in conduits, by which interference by inductive disturbances caused by electric currents from electric lights, railway and telegraph wires were as to such copper wires as were in cables avoided.

That about 2,500 subscribers now use the grounded line system.

Defendant sets out several other forms of special contracts that it has devised by which subscribers can pay in proportion to the use desired or the number of messages transmitted or for each call or message sent, also for a two-party line and ten-party line, and that by most or all of which the subscriber may obtain competent service at a less rate than \$125 per annum.

The answer sets up estoppel and acquiescence by reason of the recognition of defendant's right to make charge for the special service, etc., and prays the benefit of a demurrer to complainants' bill for want of equity, and also upon the ground of multifariousness and for improper joinder of parties complainant.

Without reviewing the evidence in detail, consisting of numerous affidavits and documentary proof, it is sufficient to say:

That it clearly appears that the grounded line telephone service, as it existed in 1889, gradually became more and more inefficient and unsatisfactory. This was caused by the introduction of wires for electric lighting and railway service, and the steadily increasing multiplication of iron pipes and conductors of electricity being placed in and over the streets and alleys of the city of Chicago.

Also that it is apparent from the evidence that the telephone service in existence at the passage of the ordinance for the causes aforesaid, demanded that some changes and improvements be made.

It became impracticable to continue the use of the iron wire and grounded circuit in the most central part of the city, and for that reason, among others, it became necessary to substitute in places the copper wire for the iron, and at certain points to have return trunk wires, so as to relieve the service from the many disturbances arising from the growth and the increasing use of the streets for public and *quasi*-public purposes, by other corporations and individuals.

The defendant's answer in connection with the evidence clearly shows the inadequacy and inefficiency of the old service for the changed condition of affairs.

The improvements which the answer alleges were made in the old grounded service by the defendant, and for which it appears the defendant made no extra charges to subscribers, must be held to have been made to advance its own interests as well as in the performance of its duty to give telephone service at the rate of \$125 per annum.

The fact that it made no charges for such improvements in the grounded line circuit, must be taken as a recognition

of its duty and obligation to give an improved service and remedy defects in the then existing service when it was practicable to do so, and this without extra charge therefor. It was equally as strong a practical construction of the ordinance as the special contracts which were entered into after the passage of the ordinance in question.

All the improvements adopted in the service, under the special service contract "Exhibit B", except the long distance connection, are practically of the same nature as the improvements in the old or grounded line service, and no reason can be perceived why the improvements in the latter service should be made and given free of charge, and those of the former or special service should be made the subject of additional charges. They were all demanded by the necessities of the situation, the changed conditions, the growing inefficiency of the service, and were demanded not only to overcome new difficulties, but also to increase the demand for telephones.

It also clearly appears from the evidence that all these improvements in the service were not only demanded for the satisfactory service to subscribers, but also that they were made by the telephone company in its own financial interest and for its own advantage.

In my opinion, from the evidence, substantially all of these improvements in instruments and in improved service rendered by the company under the special contract, "Exhibit B," would have been made had the long distance telephone never reached the city of Chicago.

It was well known at the time of the passage of the ordinance that copper was a much better conductor of electricity than iron, and that a return wire was much better than a grounded circuit; that a Blake transmitter was better than those that preceded it, and that improvements in telephones and telephone appliances were continually being sought for and discovered; that the art of telephoning was yet in its infancy, and that the future was rich in promise of its growth and improvement. The attention it was receiving from scientific experimenters, the history of the growth of the telegraph, of the railroad, of the steam engine and other great improve-

ments, all these matters must be held to be part of the "surrounding circumstances" under which the ordinance in question was passed and accepted, and which are to be considered in arriving at the intention of the parties.

That the grounded line service was steadily becoming more and more inefficient and unsatisfactory, and that the defendant found it to the interest of the company to encourage the demands for more efficient and satisfactory service is conclusively shown by the annual reports of the directors and official documents issued by the company, which have been introduced in evidence.

The annual report for 1899 contains a table showing that since 1893 the grounded line telephones in use by its subscribers decreased in the seven years, 1893 to 1900, from 8,983 to 3,843, an average annual decrease of thirty-nine per cent., while in the same period of time the metallic circuit (or improved service) increased from 1,131 telephones to 6,780, an average annual increase of sixty-four per cent.

The same annual report (1899) contains the following, which shows the cause of the large increase of the latter and the decrease of the grounded line: "Experience in all the telephone exchanges in large cities has *continued* to demonstrate the fact that *the best service cannot be* maintained and furnished over grounded lines. The interference from electric railways, electric power and lighting plants, and the inductive disturbances occasioned by long underground cable extensions, have made *this class of service* more and more difficult to maintain."

"The public needs demand not only the best quality of service, but that it shall extend to the most remote parts of the city."

In the annual report of the company for the year 1900, it is declared that "for a number of years the Chicago exchange (telephone service) was the largest at the time in the world. Its growth a few years later was seriously retarded by the troubles following the introduction of the trolley, and electric lighting currents throughout the city, which greatly interfered with the service upon the grounded lines, the only system then

in use. Since the more general adoption of *full copper metallic circuits*, by subscribers, the reliability of this service has been restored, and a *rapid growth of the exchange has followed.*"

"Opposition companies have made no material progress in our territory during the past year. * * * Of the ten opposition companies operating in the beginning of the year, five have entered into sub-license contracts, under which their systems are equipped with our standard apparatus, and may be used in connection with our general system."

In the defendant's telephone directory, issued in October, 1901, under the head of "General Information" as to how to use the telephone, report trouble, etc., occurs the following:

"On account of interference by currents from electric railways, lights, and other electric systems, *it is not possible to insure satisfactory communication by subscribers having grounded exchange lines.* The character of the service in such cases will depend largely upon the local interference encountered."

In its report for the year 1898, the company declares that "the (telephone) business is still to some extent in its experimental stage, but it is confidently believed that stage will soon be passed, and that when the various kinds of apparatus which are required shall become standard * * * a better service will become possible, and lower rates may prevail," etc.

In the face of this showing and admissions by the Telephone Company, it would be a forced construction, if any construction is necessary of the ordinance in question (which the company insists is a mere private contract between it and the city), to hold that the Telephone Company's only duty or obligation as to furnishing "telephone service" is to furnish the grounded line service in existence when the ordinance was passed.

I find no such provision in the ordinance (which could easily have been inserted had such been the understanding), nor do I find any provision or contract to furnish "an inefficient or unsatisfactory" telephone service.

Nor was the long distance telephone unknown by any means at the time of the passage of the ordinance in question. It was then known as an historic fact that Rysselberg and others had talked over a copper wire a distance of one thousand miles in length and the long distance was on its way from the east and was at or near Pittsburg at that time. The business world was alive as to its possibilities and that it must soon reach Chicago, must be assumed to have been known to the parties making the so-called contract by the ordinance in question.

The service of 1889 was not confined to the city of Chicago, but extended to many toll stations with which the defendant company was connected and to be connected.

By connecting the subscriber with an out of town toll station at a neighboring village, the subscribers could talk with a resident of a village over some other company's line, which furnished telephone service in that, or with some other, village, but the service over the other line was an extra charge on the subscriber. The relation of the parties to the long distance is precisely the same as existed in 1889 as to the out-of-the-city toll service. It is only one more toll station, or service, in addition to what the defendant company already possessed. It makes no difference that it was located in Chicago and not in one of the seven counties in which defendant had toll-station service. Why should such a connection cost \$50 per year more than any new toll station since established in an adjoining county? The charges for the service rendered after the connection is made is paid in both instances by the subscriber using the connection.

The defendant alleges it made an arrangement with the American Telephone Company for such connection and combined service. It appears that this arrangement was made as early as 1891, more than a year before the long distance telephone arrived in Chicago, and it must be presumed that it was made by the company voluntarily and because it was for its advantage to make it; also that it took care of its own interests in arranging the terms of the agreement.

Indiana decisions cited by the complainants, when taken into consideration with the case of *People ex rel. v. The Sub-*

urban Railway Company, 178 Ill. 594, must be taken as clearly controlling the case at bar.

Upon the 13th of April, 1885, the legislature of Indiana passed an "Act to Regulate the Rental Allowed for the Use of Telephones," and fixing a penalty for its violation.

Section 1 of the act provided: "No individual * * * corporation, * * * owning * * * operating any telephone line in operation in this state, shall be allowed to charge * * * as rental for the use of such telephone, a sum exceeding \$3.00 per month, where only one is rented."

One Haughey requested the Central Union Telephone Company, an Illinois corporation then operating in the state of Indiana, to extend its lines to his farm, and rent him one telephone. The company offered to rent him a hand telephone, a magneto bell, and to connect him with their exchange, and to furnish exchange service for certain hours of the day, for three dollars per month, reserving the right to put others on the same line. Haughey declined to accept this offer and entered into a contract with the Telephone Company for the use of one battery transmitter, one magneto telephone, and the necessary appliances for connecting them with the exchange, at sixteen and two-thirds dollars per month.

The items of charges were as follows:

Rental of one magneto telephone and one battery transmitter (two telephones) at the rate of \$20.00 per annum. Labor and service charges for switching, construction, and maintenance charges for lines, batteries, central office supplies, magneto bell and appliances at the rate of \$114.00.

An information was filed against the telephone company for violation of the statute; it was fined, and appealed to the supreme court.

That court, in language very applicable to the case at bar, after holding telephones to be a matter of public convenience and of public necessity, and an important and indispensable instrument of commerce, and that no other known device can supply the extraordinary facilities that it presents, holds that it is property devoted to a public use and a legitimate subject of legislative regulation and control.

The court, in its opinion, then describes the telephone in use when the act was passed—the Bell hand or magneto telephone in a hard rubber case, used in both transmitting and receiving sounds carried over a connecting wire. This with the magneto bell or call bell was all that was used at that time; then came the Blake transmitter, by which words were transmitted in a louder tone and with more effect than through the Bell hand telephone.

The Blake, though, was in use in 1885 by those who desired the best available services. Since it came into use the Bell hand telephone is used only as a receiver of messages.

It was contended on the part of the defendant that that act applied only where one telephone was used and not where two were—i. e., where the Blake transmitter and the hand telephone were both used.

The court says, "The word (telephone) constitutes a generic term, having reference generally to the art of telephony as an institution, but more particularly to the apparatus as an entirety, ordinarily used in the transmission, as well as in the reception, of telephonic messages;" that the proper meaning of the word was "an organized apparatus, an institution, and not a single instrument."

The judgment of the lower court imposing a fine for a violation of the law was affirmed. *Hockett v. State*, 105 Ind. 250.

In the case of *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1, there was brought before the court another offer on the part of the Telephone Company to avoid the law in question, and the court again held that the act imposing certain duties on the Telephone Company, passed in April, 1885, was valid, and an act which required them to serve all without discrimination or partiality.

Bradbury applied to the Telephone Company for a telephone to be placed upon his business premises. The company replied that it had several grades of equipment or service. "If you want the hand telephone and magneto bell and service from 7 a. m. to 6 p. m., we will give it to you for \$3.00 per month; or, if you wish another service, hand tele-

phone, \$10; Blake transmitter, \$10; for additional service and material furnished to you, \$40 per annum." Bradbury applied by petition for *mandamus* to compel the company to furnish him the highest grade or class of telephonic service at \$3 a month. The company answered that it could not furnish such service at \$3 a month, but that it would furnish the other specified service at \$3 per month, denying the power of the state to fix its rates and also denying that it was a common carrier of news.

The court referred to the former case in the 105th Indiana, and held it to be decisive of the case then presented and that the term "telephone," as defined in that decision, was to govern the company under the law, and awarded the *mandamus* asked for.

In *Johnson v. The State*, 113 Ind. 143, another device of the Telephone Company to evade the law was brought before the supreme court. The company undertook to impose a fixed charge of one dollar per month (in excess of the three dollars per month allowed by the statute) for non-subscribers using the telephone, which was to be charged and collected whether the telephone was or was not used by the non-subscribers and without regard to the number of such persons or the number of times that it might be used. The court held that this was a violation of the law.

It appeared in that case that the company undertook to divide its customers into six classes, charging three dollars per month to each class, and from fifty cents to two dollars additional for its use by non-subscribers, and Johnson was in class three.

The company then adopted another device for evading the law, which was brought before the supreme court, in the case of the *Central Union Telephone Company v. The State ex rel. Falley*, 118 Ind. 194.

The court held that the telephone was an instrument of commerce, and persons or corporations engaged therein are common carriers of news: that a corporation owning telephone lines, furnishing connection and facilities and service to persons * * * can be compelled by *mandamus* on pe-

tition of one discriminated against to furnish the same independent of any statutory provision against discrimination, and that it was no answer to a refusal to furnish the same to say that by furnishing him with one instrument and service, he would be placed in communication with persons outside of the state. It appears that the company had ceased doing any rental business and had adopted the toll station system in the city of Lafayette. This toll station system was connected with a telephonic system inside and outside of the city. The court held that the Telephone Company could not, directly or indirectly, take a greater rate than they might by ordinance; that the petitioner asked only for telephone service at her place of business for city purposes, and it was no answer to say that she could also connect with parties outside of the state if the telephone was placed in her place of business.

In the case of the *Chesapeake & Potomac Telephone Company v. Baltimore & Ohio Telephone Company*, 66 Md. 399, 7 Atl. 809, the company there endeavored to set up an agreement under which it was allowed to operate a telephone, that it would not receive telegraphic dispatches from a certain company. The court held the agreement in that regard void, holding that the duty of transmitting, by law, was paramount to that prescribed by the contract.

The Indiana supreme court properly held that a telephone company by no special device or pretense of improved, better or different appliances or service, could evade its duty to rent telephones and give telephone service at the rate prescribed by the statute; that the limitation of the law was not as to the telephone service in force at the time of its passage, but applied to all the telephone service at any time thereafter that the same might be furnished to subscribers.

The reasoning of the court and the principles declared in the Indiana cases are directly in point in the case at bar, and should control it, unless there is some vital difference between the limitation by legislative act and one imposed by ordinance accepted by the defendant.

The defendant contends that there is this vital distinction,

because one was the act of the legislature in the exercise of the sovereignty of the state, it was an act of the governing power, while the ordinance in question in this case was a contract and not a law; that such ordinances are not the exercise of the governing power, but of the business or private powers of the corporation.

The defendant properly contends that ordinances have a double character—governmental or public—by virtue of being made the instrument of the state to govern the particular locality, the other proprietary, or private, and that in the exercise of the latter power it is, *quo ad hoc*, a private corporation. Upon this point the learned solicitors of defendant cite several decisions of the United States courts and others, several of which refer to contracts between a municipality and a corporation to supply the people of the municipality with water.

The court has carefully considered the cases cited, but will not attempt to review them, believing them to have but little bearing upon the question here involved, when the decisions of our own supreme court are taken into consideration, which latter decisions must govern.

It is admitted that the defendant Telephone Company is a public service corporation, and analogous in many respects to that of a common carrier; that it must treat all its patrons alike and without discrimination.

In that respect it must also be held to resemble a street railway corporation, and an ordinance granting to a street railway corporation the privilege of using the streets of the city for street railway purposes on condition that it should charge not to exceed a certain rate of fare would be exactly similar in principle to the ordinance in question granting the telephone company the use of the streets, etc., on condition it should not increase its rates for telephone service above a certain amount. The two ordinances are passed in the exercise of the same power of the municipality. If one is the exercise of the governing power so is the other. If one is a private business contract so is the other.

Our supreme court, in a wide-reaching decision, has put this question at rest so far as this state is concerned.

The village of River Forest, in this county, is organized under the same act as the city of Chicago, to-wit: the general incorporation act for cities and villages, passed in 1872. It has the same power as the city of Chicago to lay out and improve streets and this general power "*to regulate the use of the same.*"

The village of River Forest passed an ordinance in due form granting the privilege to the Suburban Railway Company, an Illinois corporation, to construct, maintain, etc., its poles and tracks in the streets of the village upon certain conditions, among others that the rate of fare for the transportation of passengers from River Forest to Chicago should not exceed the rate of fare charged passengers for like service from any other stopping place within a certain part of the town of Cicero. The company undertook to discriminate in fares against residents of River Forest; information for a *mandamus* in the name of the people on the relation of one of its citizens was commenced.

It was contended, among other things, by the Suburban Railway Company, that the ordinance was a mere private contract and that *mandamus* would not lie to enforce a mere private contract; in other words, a contract made under the business powers of the corporation.

In a very able opinion by Justice Boggs the question as to the power of the village, and as to the nature of the power exercised by the village in passing the ordinance, whether governmental or not, was discussed. The case is found in *The People ex rel. Thomas M. Jackson v. The Suburban Railway Company*, 178 Ill. 594.

It was there held that a street railway company was not a private corporation, but a *quasi*-public corporation, and that "the power possessed by the state to attach, as a condition to the grant of a franchise to a *quasi*-public corporation, the performance of duties beneficial to the public, may be exercised by a municipality under its powers to grant to such corporation the use of its streets."

Also, "The fact that a street railway obtains its charter under the state laws does not make the authority given it by a municipality to use streets and alleys a mere license as the

charter merely gives the company its existence, and it cannot carry out the purpose of its existence without further exercise of sovereign power which has been delegated to municipalities with respect to their streets. * * *

“A street railway company is not a private, but a *quasi*-public corporation, and owes it as a duty to the public to demand only reasonable fares for the transportation of passengers and to serve the public without unjust discrimination, and the performance of such duty may be secured to the public by the state acting directly or through a municipality.

“A village, on granting a suburban street railway company the right to use its streets, may prescribe as a condition that the fare between the village and points in the city shall not exceed that charged patrons from another town on the line; and the acceptance of the ordinance and the enjoyment of its benefits estop the company to deny that the exaction of a greater amount is not unjust discrimination.” And that after it has enjoyed the benefit of the ordinance, the company was itself estopped to question the power of the city; that the company could not escape the performance of its undertakings by alleging that the ordinance was *ultra vires* the municipality and the company.

The court also held that “the right given by a municipality to a street railway company to use its streets is sufficient consideration for the undertakings of the company to comply with the conditions of the ordinance respecting charge for transportation.

“That being established,” says the court, “compliance with the provisions of the ordinance in the respect named becomes a duty to the public, the performance whereof is within the right and power of the village, acting as the agency of the state, to secure, by means of the conditions incorporated in the ordinance. The fact that the ordinance required the company should formally accept it as conditioned had no effect to render the grant a mere private contract. The state, through the village, as its representative, was acting, and the power which was exercised by the village was that of the sovereign. That which the ordinance required the company

should do, and should consent to do, did not become mere contract obligations on the part of the company to perform acts beneficial to the village."

The court cites in this opinion, with approval, the case of *Rogers Park Water Company v. Fergus*, page 571, of the same volume.

The contention that the passage of the ordinance in question was not the exercise of the sovereign or governing power of the state, delegated to the city of Chicago by its charter, but was a mere private or business contract of the city, not being tenable under the decisions of our supreme court referred to, it is deemed unnecessary to review the defendant's contention founded thereon, as to estoppel by the practical construction placed upon the ordinance, and the acquiescence, in such practical construction, by the city of Chicago, and the complainants, and the public generally.

Under the decisions quoted, it became the duty of the defendant as a *quasi*-public service corporation, by reason of the passage of the ordinance and its acceptance and enjoyment of the privileges conferred thereby, to furnish telephone service with all the improvements thereon to its subscribers at the ordinance rate of \$125 per annum, and no acts or acquiescence of its subscribers by signing and accepting telephone service under the special contract, "Exhibit B," can be held to be an estoppel upon such subscribers or to confer upon defendant a power which it has assumed to exercise in direct violation of the ordinance.

As held by the supreme court in the Suburban Railway Company case *ante*, the state might have provided in the charter of the defendant corporation (or by general law) that it should not charge to exceed \$125 per annum for telephone service, but instead of doing so, the state merely authorized the company to perform telephonic service within the state. It has delegated to the city of Chicago the power to regulate the use of its streets, and it is distinctly held in the case cited that under that power the state had delegated to the city the power to grant the use of its streets to the defendant, and as a condition annexed to said grant, that it should not charge

to exceed a certain rate for telephonic service while it occupied the streets of the city under such ordinances; that such power exercised by the city was the sovereign or governing power of the state delegated to the city under the charter provision giving it the right to regulate the use of the streets; also that an ordinance of this nature is not a mere private contract, but that it is the exercise of the governing power of the state; that it became the duty and obligation of a *quasi*-public corporation like the defendant, exercising powers under such an ordinance, to comply with the same and furnish the service agreed to be furnished at the rate fixed by the ordinance, which rate by the consent of the city and of the defendant was determined to be a reasonable rate for the service to be performed.

Not being a private contract or a contract separate and apart from the exercise of the governing power of the city, the doctrine of practical construction and acquiescence contended for by the defendant can have no application, because as a public service corporation it was bound to give telephonic service at the rate fixed by the ordinance. When a subscriber cannot obtain satisfactory service except by entering into a contract by which he agrees to pay a greater rate than that fixed by the ordinance, the rate agreed to be paid, so far as it is in excess of the rate prescribed by the ordinance, must be held to be an illegal exaction, and not only illegal but forced, a forced agreement, by the company exacted of the subscriber, and not a voluntary contract which would estop him from disputing the same.

In the language of the Iowa supreme court, where a public service corporation exacts greater charges than is authorized by the law, the payment of such charges is not regarded as voluntary, nor is the making of any protest or objection necessary in order to recover back the excessive charges.

“The law does not require objection or protest to be made to the payment of unjust charges, for the reason that it would be in vain, being addressed to those who occupy the commanding power to enforce obedience to their requirements.” *Heiserman v. Burlington, C. R. & N. R. Ry. Co.*, 63 Iowa, 732, 18 N. W. 903.

There is no contest made by the complainants as to the rights of the company to charge extra for what is called extension service.

With that exception the service rendered under the special contract, "Exhibit B," in question, must be rendered by the defendant at the ordinance rate, \$125 per annum.

An order may be prepared in accordance with the views here expressed for a preliminary injunction as prayed for in the bill—upon the complainants, or some of them, entering into a bond to be approved by the court, in the penal sum of ———, conditioned, as provided by law.

The following is the injunction order as entered:

This day there comes on to be heard the motion for an injunction on behalf of the following named complainants and co-complainants: * * *

Said motion comes on to be heard upon the sworn bill of complaint herein and the exhibits thereto attached, upon the sworn intervening petition of said co-complainants, upon the affidavits and documentary evidence offered and read in support of said bill and intervening petition, upon the affidavits offered and read by said defendant, among which were the sworn answers to said bill and intervening petition, which sworn answers were used as affidavits by said defendant; and the court having considered said bill, intervening petition and all said affidavits and documentary evidence, and said motion for an injunction having been argued by Messrs. Moran, Mayer & Meyer, solicitors for said complainants and co-complainants, and by Messrs. John J. Herrick and Holt, Wheeler & Sidley, solicitors for said defendant, and the court having duly considered the matter and being fully advised in the premises, doth find that said named complainants and co-complainants respectively, are entitled, until the final hearing of this cause, to an injunction as prayed in said bill and in said intervening petition.

Wherefore, the premises considered, it is hereby ordered, adjudged and decreed, that until the final hearing of this cause, the said defendant, Chicago Telephone Company, its

officers, attorneys, agents and servants shall be, and they are hereby enjoined and restrained, as prayed in said bill and in said intervening petitions, as follows:

1st. From removing or attempting to remove or from displacing or attempting to displace any of the telephone instruments and appliances, with copper metallic circuits, referred to in said bill of complaint and in said intervening petition, and now in the respective places of business of said named complainants and co-complainants as described in said bill of complaint and in said intervening petition; and from in any manner interfering with or interrupting said telephones, appliances and copper metallic circuits, and from cutting off or interrupting the circuits connecting the said places of business of said complainants and co-complainants respectively with the exchanges or switches of said Chicago Telephone Company, and from refusing to continue to supply the present telephone service as now rendered to said complainants and co-complainants respectively, as described in said bill of complaint and in said intervening petition. This order is entered upon the condition that so long as it shall remain in force the said complainants and co-complainants respectively, shall pay or offer to pay to said Chicago Telephone Company at the rate of one hundred and twenty-five dollars (\$125.00) per annum for each telephone instrument connected by copper metallic circuit with the exchange of said defendant for the business use of said complainants and co-complainants respectively and their respective employes, and that such payment or offer to pay shall be made at the times and in the manner specified in the respective contracts (a copy of which is attached to said bill of complaint and marked "Exhibit B"), and that said complainants and co-complainants respectively comply with all of the other provisions of such contracts, except the provision therein contained requiring the payment of one hundred and seventy-five (\$175.00) dollars per annum for each such telephone instrument and appliance and connected by copper metallic circuit with the exchange of said defendant, and for such telephone service.

Nothing in this order contained is meant to limit or restrict

said defendant from exercising all rights and privileges in said contracts provided, except that said defendant shall not have the right to exact from said complainants and co-complainants respectively, a sum in excess of one hundred and twenty-five (\$125.00) dollars per annum for each such telephone, telephone appliance, copper metallic circuit and telephone service for the business use of said complainants and co-complainants respectively, and their respective employees. The receipt by the defendant of payment at the rate of one hundred and twenty-five (\$125.00) dollars per annum shall not prejudice its claim in respect to the \$50.00 in dispute. Nothing in this order contained shall effect the price to be paid for so-called extension sets.

2nd. That all other persons, firms and corporations similarly situated with said complainants and co-complainants respectively, and whose respective places of business (in which such telephone instruments and appliances and copper metallic circuits for business use are located), are situated in the territory inside of the blue lines referred to in said bill of complaint and shown upon "Exhibit A" to said bill, being the territory within the city of Chicago, bounded by Lake Michigan on the east and a line running from the lake west on North avenue to the river; then down the channel east of Goose island to Chicago avenue; then up the river channel to Division street; west on Division street to Western avenue; south on Western avenue to 21st street; east on 21st street to Ashland avenue; southeast from Ashland avenue to the corner of 31st street and the river; east on 31st street to railroad tracks east of LaSalle street; south on railroad tracks to 39th street; east on 39th street to Lake Michigan; may, upon proper application to this court from time to time, become parties co-complainant to said bill of complaint by an appropriate order of the court to be entered from time to time in this cause for such purpose, and (unless in such order or orders it is otherwise provided) as soon and as often as such order or orders are entered herein, the injunction hereby granted shall *ex proprio vigore* extend to and in behalf of and apply to and be in force for the protection of such other par-

ties with the same force and effect and upon the same conditions herein contained, as though such other parties had been specifically named in this order.

3rd. That this order shall take effect upon the filing by said Illinois Manufacturers' Association, or any other one or more of said complainants or co-complainants, of a bond in the penal sum of ten thousand dollars, upon such condition and with such surety as may be approved by the court. And the defendant is allowed thirty days within which to prepare and file a certificate of evidence. Thereupon the defendant prays an appeal from the foregoing order to the appellate court in and for the 1st district of Illinois, which is allowed upon defendant giving bond as provided by law in the penal sum of three hundred dollars (\$300.00).

Enter

M. F. TULEY.¹

NOTE.

RECOVERY OF EXCESS PAYMENTS EXACTED BY CARRIERS AND OTHER PUBLIC SERVICE CORPORATIONS IN EXCESS OF LEGAL RATE.

A. Where a public service corporation exacts charges greater than permitted by law, as the parties do not stand upon an equal footing, the payment of such charges is, as a matter of law, involuntary, and the excess may be recovered back. There are but two essentials to a recovery, viz.: The illegality of the charge and the unequal footing of the parties. The doctrine of voluntary payments as applied in cases between private individuals has no application.

In *Louisville, etc. R. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311, it was said that the decided weight of authority is to the effect that the payment of an overcharge of freight to a railroad company is not a voluntary payment within the meaning of that term, and that there was but little conflict in the authorities upon the proposition. The Indiana case was cited with approval in *News Publishing Co. v. Associated Press*, 114 Ill. App. 241, where a recovery was allowed of certain excessive and discriminating charges made to obtain news service.

In *Parker v. Great Western Ry. Co.*, 7 M. & Gr. 253 (a leading case), a recovery was allowed where the carrier had exacted charges in excess of a legal rate. The court said: "We are of opinion that the payments were not voluntary. They were made in order to in-

¹ Upon the death of Judge Tuley the above case was assigned to Hon. Julian W. Mack, and is now on final hearing before that judge.

duce the company to do that which they were bound to do without them; and for the refusal to do which an action on the case might have been maintained."

In *Swift v. United States*, 111 U. S. 23, the authorities are reviewed. There the claimant was entitled to certain commissions on the purchase of internal revenue stamps required in the sale of matches. The commissioner of internal revenue adopted a rule which required such purchasers to take their commissions in stamps instead of in cash, as they were entitled. These transactions occurred from 1870 to 1878. Prior to 1866 the leading manufacturers of matches, among whom was W. H. Swift, one of the stockholders and treasurer of the claimant corporation, made repeated protests to the internal revenue officers in relation to the ruling, but no protest was made on behalf of the plaintiff corporation. The court held that claimant could recover. The court referred to *Parker v. Great Western Ry. Co.*, *supra*, and said that in that case: "The wholesome principle was recognized that payments made to a common carrier to induce it to do what by law, without them, it was bound to do, were not voluntary, and might be recovered back."

In *McGregor v. Erie Railway*, 35 N. J. L. 89, an action was brought by a shipper to recover from the defendant carrier monies exacted for the carriage of freight in excess of the rates fixed in the company's charter. The court held that inasmuch as the parties were not on an equal footing that the payment could not be considered as voluntary, and a recovery was allowed. The court said: "Where a corporation or person has the power to refuse a right to which a party is entitled, unless he complies with an unjust demand, they do not stand on an equal footing. The courts will not be illiberal in allowing a person to act upon his reasonable apprehension of such refusal, when the circumstances fairly show that unless he does submit to the illegal demand, his rights will be withheld."

In *Peters v. Railroad Co.*, 42 Ohio St. 275, a recovery was allowed where the defendant exacted freight charges in excess of the rate fixed by law. The payments in question were made after the services were rendered.

In *Directors of Great Western Ry. Co. v. Sutton*, L. R. 4 Eng. & Irish App. Cas. 226, it was held that excess payments made to a carrier to induce him to perform his duty might be recovered back.

In *Great Southern & Western Ry. Co. v. Robertson*, 2 L. R. Ireland, 548, the same doctrine was announced. The court said: "When a man pays more than he is bound to do for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion in respect of which he is entitled to recover the excess by action for money had and received."

In *Heiserman v. Burlington, C., R. & N. Ry. Co.*, 63 Iowa, 732, 18

N. W. 903, plaintiff sued to recover monies paid for the carriage of freight in excess of the rate fixed by statute. The court held that protest was not essential to a recovery for the reason that those who deal with public carriers are in their power and must bow to the "rod of authority" which they hold over their customers. The case is a well considered one.

In *Indiana, etc. Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868, an action was brought to recover back certain excess charges for gas, paid through fear that the supply would be cut off. The court said: "If appellee paid the excessive rate as a matter of necessity to obtain what he was justly entitled to, he may recover it back, although he knew at the time of the payment that the demand was unjust. If appellant had the right to turn off the gas unless appellee complied with its demands, the parties were not treating upon equal terms." There was, however, no actual threat to turn off the gas.

In *Beckwith v. Frisbie*, 32 Vt. 559, it was held that where the parties do not stand upon an equal footing the payment is not voluntary.

In *Capital Gas & Electric Light Co. v. Gaines*, 49 S. W. 462, 20 Ky. Law Rep. 1464, the gas company procured an ordinance requiring it "to supply consumers of gas at the rate of not exceeding \$2 per thousand cubic feet." The company, and the city before it, had for more than twenty years been in the habit of charging and consumers were accustomed to pay, in addition for the charge for gas, a meter rent at the rate of twenty-five cents per month. Complainant sued to recover the meter rents paid by him. The court said: "Appellee is entitled to recover such sums as he paid for meter rent for the five years preceding the filing of his pleading in which he asserts his claim. If the appellant was not entitled to collect meter rent under the terms of the contract, then honor and good conscience required it to be returned although the payment was voluntarily made."

The principle in question is thus laid down in 2 Page, Contracts (1905), sec. 810: "Payments made by one who is not on terms of practical equality with the person to whom such payments are made are looked upon, not as voluntary payments, but as payments made under compulsion." And in the same section it is said that "A common carrier and shipper do not stand upon terms of equality."

In *Railroad Company v. Lockwood*, 17 Wall. 357, 379, it is said: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgler or stand out and seek redress in the courts."

In *County of La Salle v. Simmons*, 10 Ill. 513, the defendants, who were county commissioners, gave notice in 1837 that they would grant a license for a ferry across the Illinois river to the person that would donate the largest sum of money to the county. Up to that time the plaintiff had kept the ferry and was an applicant for a

license to continue the same. Several offers were made for the franchise, and the plaintiff bid the sum of \$500. It was held that the payment could be recovered back, as it was coerced through an undue advantage taken of the plaintiff's situation.

In *Prickett v. Madison County*, 14 Ill. App. 454, a controversy arose out of a transaction in which the county of Madison issued certain bonds and exchanged them for old ones. The plaintiff, who was chairman of the board of supervisors, insisted that he had passed over to the county treasurer bonds to the amount of \$303,000, while the treasurer insisted that he had received no more than the receipts held by plaintiff called for, namely, \$301,000. The matter was made the subject of investigation by the board, and plaintiff, being unable to produce receipts for more than \$301,000, and the board demanding that the deficit should be made good, the plaintiff, having nothing but his own memorandum to sustain him, finally paid the amount in dispute to the county. Subsequently he found the missing receipt, and brought his action to recover back the money. A recovery was allowed.

In *Chicago & Alton R. R. Co. v. Chicago, Vermillion & Wilmington Coal Co.*, 79 Ill. 121, certain individuals constructed a railroad extending from a coal mine belonging to the plaintiff to a station on the Illinois Central Railroad. The road in question was conveyed to the defendant. The original parties had previously made a contract that the railroad company should carry coal from the plaintiff's mine to the I. C. R. R. at \$3 per car. The defendant company, for a time, carried coal for the plaintiff under the contract at that price, but thereafter it exacted \$9 per car. The plaintiff brought suit to recover the excess. The court said: "It can hardly be said these enhanced charges were voluntarily paid by appellees. It was a case of 'life or death' with them, as they had no other means of conveying their coal to the markets offered by the Illinois Central, and were bound to accede to any terms appellant might impose. They were under a sort of moral duress, by submitting to which appellants have received money from them which, in equity and good conscience, they ought not to retain."

In *Mobile, etc. Ry. Co. v. Steiner*, 61 Ala. 559, an action was brought to recover charges exacted in excess of statutory rates on freights. The defendant had shipped large quantities of goods, and the defendant had compelled them to pay the excess charges. The court held that a recovery could be had, saying: "Railroads have so expedited and cheapened travel and transportation; have so driven from their domain all competing modes of transportation, that the public is left no discretion but to employ them, or suffer irreparable injury in this age of steam and electricity. They have their established rates of charges, and these the shipper must pay, or forego their facilities and benefits. To object or protest would be an idle

waste of words. The law looks to the substance of things, and does not require useless forms or ceremonies. The corporation and the shipper are in no sense on equal terms, and money thus paid to obtain a necessary service is not voluntarily paid, as the law interprets that phrase."

In *Baker v. City*, 11 Ohio St. 534, the plaintiff, a proprietor of a theatre, applied to the mayor for a license. The mayor demanded the sum of \$63.50 in addition to the expense of issuing the license, as a condition precedent to its issuance. Fearing prosecution for violating the ordinances of the city by giving performances without a license, the plaintiff paid the amount demanded, under protest, and then brought his action to recover the same. The court allowed a recovery, saying: "These cases show that money may be properly held to have been paid involuntarily, or under coercion, where the position or interests of a party were such as to require from another the performance of a duty enjoined by law, and he was illegally compelled to pay the money to induce such performance. Undue advantage is not to be taken of the party's situation."

In *Smith v. Cuff*, 6 M. & S. 160, defendant refused to enter into a composition agreement to enable plaintiff to procure a discharge from bankruptcy unless plaintiff gave defendant notes for the balance of defendant's claim against plaintiff. Upon receiving the notes defendant sold the same, and plaintiff, having been required to make payment thereof, sued his creditor to recover back the amount paid. The court affirmed a judgment in plaintiff's favor. Lord Mansfield, C. J., said: "There was an inequality of situation between these parties; one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce."

In *Atkinson v. Denby*, 6 H. & N. 778, in a similar case, Baron Pollock placed the right of recovery not only on the ground that defendant's action was a fraud on plaintiff's other creditors, but also on the ground that the payment could not be regarded as having been voluntarily made.

In 1 Wharton, Contracts (1882), sec. 149, after speaking of the common-law rule respecting duress, it is said: "Nor is the principle confined to payments made to recover goods; it applies equally well when money is extorted as a condition to the exercise by the party of any other legal right."

In Leake, Contracts (4th ed. 1902), pp. 61, 62, it is said: "Money extorted by a person for doing what he is legally bound to do without payment, or for a duty which he fails to perform, may be recovered back. * * * Upon this principle where a common carrier refuses to carry goods tendered for carriage, or to deliver goods carried unless paid an excessive charge, the owner of the goods being willing to pay what is justly due, but obliged to pay the full amount charged,

may recover back the excess as money received to his use." Wald's Pollock, Contracts (3rd ed.), p. 731, is to the same effect.

Keener, Quasi Contracts, pp. 426, 437, 438, says that plaintiff may recover money paid "to induce the defendant to discharge a duty." Addison, Contracts (9th ed.), pp. 431, 434, says: "Money improperly received and wrongfully detained. * * * The action upon such implied promise lies moreover against all persons who extort money for doing what they are by law bound to do without payment or reward, and who take or wrongfully detain the money of another; 'for,' as it has been justly observed, 'no man will venture to take if he knows that he is liable to refund.'"

In *Hooper v. Mayor*, 56 L. J., Q. B. 457, where harbor dues were charged in excess of the statute, Lord Chief Justice Coleridge said: "Where one exacts money from another and it turns out that, although acquiesced in for years, such exaction is illegal, the money may be recovered as money had and received, since such payment could not be considered as voluntary so as to preclude its recovery."

In *Morgan v. Palmer*, 2 B. & C. 729; S. C., 4 Dowl. & Ry. 283, a mayor overcharged for a publican's license. The court held that the defendant was not entitled to take any such fee, even though it had been immemorially paid for sixty-five years. Holroyd, J., said (p. 737): "I think that the money may be recovered in this action, and that it does not fall within that class of cases which apply to voluntary payments."

In *Transportation Co. v. Sweetzer*, 25 W. Va. 434, a recovery was allowed of excess freight charges. The case contains a thorough review of the authorities, which are reviewed at length in a masterly manner.

In *City v. Northwestern Mutual Life Ins. Co.*, 218 Ill. 40, it was held that a purchaser of property who pays to the city back water taxes owing by former owners of the property, which payment is made to prevent the city carrying out its threat to shut off the water, can recover back such taxes.

In *Hilton Lumber Co. v. Atlantic Coast Line R. Co.* (N. C.), 53 S. E. 823, it was held that where a higher charge was paid by the plaintiff than that charged other shippers, the payment is not voluntary, and the excess can be recovered back. The court said: "The authorities are uniform upon this question." This same conclusion is arrived at in *Salt River Valley Canal Co. v. Nelssen* (Ariz.), 85 Pac. 117.

In *Ratterman v. Express Co.*, 49 Ohio St. 608, it was held that the payment of an illegal tax on gross receipts of an express company under protest, and with notice of an intention to bring an action to recover back the same, is not a voluntary payment when made to avoid destruction of the company's business.

In *Harmony v. Bingham*, 12 N. Y. 99, it was held that where a

carrier, having in his possession a large amount of merchandise, exacted for freight more than was due, and the owner in order to obtain possession of the property paid the amount under protest, it was not a voluntary payment. In *Bank v. Watkins*, 21 Mich. 483, a payment of an illegal demand (a tax) to a public officer under protest was held to be involuntary. In *McKee v. Campbell*, 27 Mich. 497, it was held that payment to an officer under legal process is not voluntary, although no levy is made. In *Insurance Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 665, payment by a foreign corporation of a license tax under an unconstitutional law made to protect the company's property interests is not voluntary.

In *Howe v. State*, 53 Miss. 57, it was held that the allowance by the board of supervisors of a county of excessive and illegal commissions to the county treasurer, and the approval by the board of his accounts, showing on their face that he had retained said sums, is not such a voluntary payment by the board as to prevent the recovery, by a suit on his official bond, of the amounts so retained.

In *Westlake v. City*, 77 Mo. 47, it was held that the payment of a water license under threat of turning off the water in case of continued refusal, is payment under compulsion, and if the charge is excessive the excess may be recovered.

In *State v. Nelson*, 41 Minn. 25, it is held that where a person is unable to place on record a deed of conveyance by which he has acquired title to real estate, by reason of illegal taxes being charged upon the land, he may pay such taxes, in order to secure the recording of his deed, without such payment being deemed voluntary."

In *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, it was held that where a party filed a mechanic's lien against property upon an unfounded claim, which the owner paid under protest in order to clear the title of record so that he might consummate a loan upon the property which he had negotiated in order to raise money to pay a prior overdue mortgage and other pressing debts, he having no other available means of raising the money, such payment was made under duress. This case contains a full review of the authorities, and shows the expansion of the common-law doctrine. To the same effect, see *City of Chicago v. Klinkert*, 94 Ill. App. 524; *Galesburg, etc. Ry. Co. v. West*, 108 Ill. App. 504; *City v. Waukesha Brewing Co.*, 97 Ill. App. 583; *City v. Sperbeck*, 69 Ill. App. 562; *Stephan v. Daniels*, 27 Ohio St. 527; *Pingree v. Mutual Gas Co.*, 107 Mich. 156, 65 N. W. 6; *Moses v. MacFerlan*, 2 Burr. 1005; *Bruner v. Town of Stanton*, 102 Ky. 459, 43 S. W. 411; *Guetzkow v. Breese*, 96 Wis. 591, 72 N. W. 45; *Carew v. Rutherford*, 106 Mass. 1; *Brewing Co. v. City*, 140 Mo. 419, 37 S. W. 525; *Railroad Co. v. Wolcott* (Ind.) 39 N. E. 451; *Railroad Co. v. Pattison*, 41 Ind. 312; *Panton v. Water Co.*, 50 Minn. 175, 52 N. W. 527; 2 *Rapalje & Mack's Digest of Railway Law*, pp. 628 et seq.; *N. Y. Cons. Card Co. v. United States*, 20 Ct. of Cl. 174; *Rip-*

ley v. Gelston, 9 Johns. 201; Redfield, Railways (6th ed.), sec. 124; 1 Wood, Railways, sec. 206; *Higley v. Railway Co.*, 68 N. W. 829; S. C., 99 Iowa, 503 (holds protest immaterial); *Oates v. Hudson*, 6 Exch. 346 (money paid to obtain possession of deed recovered. See note at end of case); *Hancock v. Town of Dartmouth*, 2 Nova Scotia L. R. 120 (money paid for peddlers' license recovered back. Follows *Morgan v. Palmer*, 2 B. & C. 562); *Little v. The Dundas & W. M. Road Co.*, 2 U. P. C. P. 399 (tolls paid in order to enjoy a road are compulsory. Follows *Parker v. Railway Co.*, 7 M. & G. 253); *Hooker v. Gurnett*, 16 U. C. Q. B. 180 (fees exacted by clerk held recoverable. Following *Morgan v. Palmer* and *Dew v. Parsons*); *Corporation v. Sheriff*, 19 U. C. Q. B. 178 (sheriff's mileage fees held recoverable. Follows *Steele v. Williams* and *Dew v. Parsons*); 1 Story, Contracts (5th ed.) secs. 520 *et seq.* (money paid under compulsion may be recovered); *Tendbrook v. City*, 7 Phila. 105 (water rates paid under compulsion held recoverable); *Corporation v. Poussett*, 21 U. C. Q. B. 472 (illegal fees exacted by clerk held recoverable. Following *Steele v. Williams*, 8 Exch. 625); *Stimson v. Kerby*, 7 Grant Ch. 510 (excess interest held recoverable); *Deal v. Martin*, 1 Phila. 106 (held money exacted *colore officii* recoverable. Following *Dew v. Parsons*); Hutchinson, Carriers (2d ed.) pp. 513, 514, 515, 894 (to effect that excess freight charges may be recovered); *Close v. Phipps*, 7 Man. & G. 585 (money paid by mortgagor under threat of sale held recoverable. Following *Parker v. Railway Co.*); *Quinnett v. Washington*, 10 Mo. 53 (held that money paid to have goods restored which were illegally taken under distress for rent may be recovered); *Bexar B. & L. Ass'n v. Robinson* (Tex.) 14 S. W. 227 (usurious interest voluntarily paid held recoverable); Brantley, Law of Contracts (1893) pp. 281, 282 (excess freight rates recoverable); Comyn, Contracts (1831) pp. 338, 340, 344, 345, 358, 366, 367, 378, 379, 380 (on payments under compulsion); Powell, Contracts (1802) pp. 204 *et seq.* (on payments under compulsion); 1 Beach, Modern Law of Contracts (1896) sec. 664 (money paid under duress and excess freight charges may be recovered); Hammon, Contracts, p. 666 (payment under compulsion may be recovered); *American Brewing Co. v. City*, 187 Mo. 367, 86 S. W. 129 (1905) (holds money paid for water supply is under compulsion and can be recovered); *Cobb v. Munce*, 3 Australian Jurist, 46 (money received *colore officii* recoverable); *Lum v. McCarty*, 39 N. J. L. 287 (to the same effect); *Armitage v. Smith*, 4 Australian Jurist, 175 (money exacted under compulsion recoverable); *King v. Bannatyne*, 20 N. Z. L. R. 232 (money exacted *colore officii*).

See also, upon the subject in general, notes in 94 Am. St. Rep. 395; 30 Am. Law Reg. (N. S.) 641, and note to *Marriott v. Hampton*, 2 Sm. L. C. 1690.

B. Payments made to a public service corporation in excess of

the legal rate stand upon the same footing as an overcharge by a public official. Such overcharge can always be recovered back.

Kenneth v. S. C. R. R. Co. (S. C.) 15 Rich. Law, 284, was a suit against a common carrier to recover overcharges. The court, in referring to the restrictions on defendant's right to make the charges, said (p. 306): "The restrictions which are imposed are substantive and independent regulations of law defining their (the carrier's) powers, like the acts * * * prescribing the fees of public officers."

Edmonds v. Abeel, 20 Hun, 441, was an action to recover excess charges paid for ferriage. The court said: "As is said by the plaintiff's counsel, the taking of more than the legal rate of ferriage is in the nature of extortion, or like the taking of illegal fees by public officers, because the defendant was conducting a public franchise. The plaintiff had a right to cross, on paying the legal toll. To take more than that, against the plaintiff's will, must make the party who takes the money liable to refund."

In 2 Wharton, Contracts (1882) sec. 738, it is said: "A common carrier is regarded as so far a public officer that excessive payments extorted by him can be recovered back in an action for money had and received, and this is eminently the case with railway companies when imposing unequal and extortionate charges."

In Keener, Quasi Contracts, p. 426, the author says: "Money paid to one, who, because of his position, is under an obligation to discharge certain duties to the public, but who refuses to discharge such duties without the payment of a sum of money to which he is not entitled, can be recovered as money paid under compulsion." The author then refers to *Steele v. Williams*, 8 Exch. 625 (overcharge by a parish clerk), and to *Dew v. Parsons*, 2 B. & A. 562 (overcharge by a sheriff), and says: "On the same principle it is held that a carrier who refuses to receive goods tendered to him unless a sum of money is paid to which he is not entitled must refund to the plaintiff the overpayment made in such circumstance." To the same effect is Leake, Contracts (4th ed., 1902) pp. 61, 62, *supra*.

In *American Steamship Co. v. Young*, 89 Pa. St. 186, the steamship company sued a United States shipping commissioner to recover \$2 per head illegally collected from plaintiff by defendant for certain seamen employed by plaintiff. The court, in allowing a recovery, said (p. 191): "We think that sound public policy requires us to hold that a public officer who, *virtute officii*, demands and takes as fees for his services what is not authorized, or more than is allowed by law, should be compelled to make restitution. He and the public who have business to transact with him do not stand upon an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much

he is authorized to demand for his services; but with them it is different. They have neither the time nor the opportunity of acquiring information necessary to enable them to know whether he is claiming too much or not; and, as a general rule relying on his honesty and integrity, they acquiesce in his demand." Citing cases.

In *Lewis v. City* (Cal.) 82 Pac. 1106, plaintiff, as executor of an estate, sought to file an inventory and appraisement. The clerk of the court refused to accept it until plaintiff paid a fee of \$70 for so doing. Plaintiff paid and sued to recover back. The court held the payment involuntary on the ground that whenever a person is obliged to pay an illegal fee to a public officer in order to induce him to do his duty, a recovery may be had.

In *Cook County v. Fairbank*, 222 Ill. 578, it was held that money paid by executors to the probate clerk under protest to obtain letters testamentary, which he refused to issue until the same was paid to him as fees, may be recovered in an action of assumpsit, where the clerk had no legal right to the fees demanded.

In *Townshend v. Dyckman*, 2 E. D. Smith, 224, the defendant, who was the register of the city of New York, refused to permit the plaintiff to examine the mortgage indexes unless he paid a fee of five cents. Plaintiff paid the money and was allowed to recover it back.

In 22 Am. & Eng. Ency. of Law (2d ed.) p. 619, it is said: "The rule is well settled that a payment exacted by and paid to a public officer in excess of his legal fees in order to obtain the performance of his official duty, to which the payor is entitled without such payment, is compulsory, and may be recovered back, and in such case it is not necessary that the payor should have protested against the payment."

In *Britton v. Frink*, 3 How. Pr. Rep. 102, excessive costs were paid an attorney in settlement of a suit, and a recovery was allowed.

In *Steele v. Williams*, 8 Exch. 625 (a leading case), a parish clerk charged illegal fees for an examination of the parish register. The court said: "The law relating to voluntary payments has nothing to do with the case. The defendant was entitled to take certain specific fees and nothing more. The payment in this case was made without consideration, and it is an abuse of language to call it voluntary."

In *Dew v. Parsons*, 1 Chitty, 295, a recovery of excess fees paid to a sheriff was allowed.

In *Marcotte v. Allen*, 91 Me. 74, 39 Atl. 346, the city clerk, though paid fees for burial permits by the city, charged and collected similar fees from the plaintiff, an undertaker. The court allowed a recovery on the ground that the defendant was a public officer and because the parties were not on a level.

In *Robinson v. Ezzell*, 72 N. C. 231, the register of deeds exacted excessive fees for recording a chattel mortgage under a claim that property covered thereby required a charge as for recording a real estate mortgage. Plaintiff paid the excessive amount under protest. The court allowed a recovery. See also Wald's Pollock, Contracts (3d ed.) pp. 730-732. To the same effect see *Lovell v. Simpson*, 3 Esp. 153 (overcharge by sheriff); *Walker v. Ham*, 2 N. H. 238 (overcharge by sheriff); *Stevenson v. Mortimore*, Cowp. 805 (op. by Lord Mansfield); *Evans v. Funk*, 151 Ill. 650 (illegal fees accepted by a judge); *Barnes v. Foley*, 5 Burr. 2711 (overcharge by postmaster); *City of Chicago v. Sperbeck*, 69 Ill. App. 562 (illegal license fees); *Traherne v. Gardner*, 5 El. & Bl. 914 (illegal fees exacted by clerk of copyhold court); *Cartwright v. Rowley*, 2 Esp. 723 (monies paid steward of a manor to produce deeds and court rolls at trial); Greenhood, Public Policy, p. 90; Story, Agency (9th ed.) sec. 307; 22 Am. & Eng. Ency. of Law (2d ed.) pp. 611, 619. See also cases cited under *A. supra*.

C. Where a charge is made in violation of a law intended to protect one set of persons against imposition or extortion by another, the amount so paid may be recovered back. The question of duress is not involved.

In *Evans v. Funk*, 151 Ill. 650, it was held that where a probate judge received a fee from a person interested in an estate as compensation for inducing the executor of such estate to make a compromise of a will contest, in violation of the statute, such payment could be recovered back. The plaintiff was ignorant of the statute at the time of the making of the payment.

In *Gray v. Roberts*, 2 Marsh. (Ky.) 208, plaintiff gave defendant notes for lottery tickets, and, having thereafter paid the notes, sued to recover back. The court of appeals of Kentucky, in holding that there could be a recovery, said: "Where the transaction is in violation of a law made for the protection of one party against acts of another, they are not equally guilty, and the innocent party, when he has paid money upon such a transaction, may, without doubt, recover it back."

In *Hall v. Kimmer*, 61 Mich. 269, an attorney charged an illegal fee in connection with the collection of a pension. In allowing a recovery back, the court said: "A charge beyond \$10 is, under the law, against public policy and cannot be sustained. * * * The money taken beyond the amount allowed for such services by the agent may be recovered back by the pensioner as money received for his use."

In *Smart v. White*, 73 Me. 333, involving an illegal charge for procuring a pension, the court said: "The parties do not stand *in pari delicto*. * * * The punishment is to be inflicted upon the taker and not upon the giver. She (plaintiff) is to be protected, not

punished. Her ignorance of the law or her folly, if not ignorance of it, is excusable. But his is not. He commits the wrong, she does not. She cannot defraud herself. The statute would be nullified by a different interpretation. * * * If the plaintiff assented to the payment under and by force of the contract (which she theretofore entered into with defendant) because she was mistaken as to her legal rights, and did not know of the protection vouchsafed to her by the statute, she was defrauded."

In *Thomas v. City of Richmond*, 12 Wall. 349, the supreme court of the United States said: "Lord Mansfield, in *Smith v. Bromley*, 2 Doug. 696, as long ago as 1760, laid down the doctrine, which has ever since been followed, in these words: 'If the act be itself immoral or the violation of the general rule of public policy, both parties are *in pari delicto*, but when the law violated is calculated for the protection of the subject against oppression, extortion and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover.'" Smith, Contracts (6th ed.) p. 274, is to the same effect.

In *Smith v. Bromley*, 2 Doug. 696, plaintiff's brother having committed an act of bankruptcy, plaintiff paid defendant for signing the bankrupt's certificate, and sued to recover back such payment. In holding that the action would lie, Lord Mansfield said: "There are * * * laws which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover." *Atkinson v. Denby*, 6 H. & N. 778, is to the same effect.

In *Barnes v. Foley*, 5 Burr. 2711, it was held (opinions by Mansfield, Aston and Willes) that an action for money had and received would lie against a postmaster who had exacted fees for making personal deliveries of letters, where such fees were not permitted by an act of parliament.

In *Southern Railway Co. v. Machine Co.*, 135 Ala. 315, 33 So. 274, a recovery was allowed because the exaction of freight rates involved was in excess of the statute, and consequently extortionate.

In *Rice v. Railway Co.*, 122 Mich. 677, 81 N. W. 927, a street railroad charged excessive fare. A recovery was allowed because the ordinance was violated.

In *Pingree v. Mutual Gas Company*, 107 Mich. 156, 65 N. W. 6, a recovery was allowed for a charge for gas in excess of rates fixed by ordinance. To the same effect are: 1 Comyn's Dig., p. 185; Stephens' Nisi Prius (ed. 1844) p. 335; 1 Selwyn's Nisi Prius (7th Am. ed.) pp. 88, 90; *Williams v. Headley*, 8 East, 378; *Great Southern & West. Ry. Co. v. Robertson*, 2 L. R. Ireland, 548, *supra*; Endlich, Building Ass'n (2d ed.) sec. 369; *Bates v. N. Y. Ins. Co.*, 3 Johns. Cas. *238; 2 Greenleaf, Evidence (16th ed.) sec. 121; *Directors, etc.*

of *Great Western R. Co. v. Sutton*, L. R. 4 Eng. & Irish App. Cas. 226.

CONTRA CASES. A. In discussing the cases which are cited as holding a *contra* doctrine, a distinction must be noted with respect to cases in which public service corporations have charged more than "reasonable rates" for a service, such rates not being fixed by charter or statute. The leading case of this character is *Killmer v. N. Y. Central R. Co.*, 100 N. Y. 395. There the plaintiff made almost daily shipments of milk for thirteen years over the defendant's railroad without agreement as to the rates and without any complaint that the charge was excessive. Suit was brought to recover an excess over what was claimed to be a reasonable charge. The court denied a recovery, saying: "What is a reasonable sum for transportation of goods on the great railroad lines of the country in a given case is often a complex question, into which enters many elements and considerations, and is incapable of exact solution. * * * The common-law duty does not preclude special contracts between railroad corporations and shippers regulating the freight charge; and where, as in this case, the freight had been carried for a long course of years at schedule price, the shipper making no objection and no inquiry as to the reasonableness of the charge, and when it was his interest to object if the charge was unreasonable, he must, we think, be deemed to have assented to the charge as reasonable, and to have voluntarily waived any objection thereto. At least the receipt by the company of the freight at the tariff rate under such circumstances has no element of extortion."

After thus stating the reasons for refusing a recovery in that class of cases and after referring to certain English cases in which recoveries were allowed, the court distinguished them by saying (p. 402): "In these cases there was a violation of a specific statutory duty on the part of the railroad corporation."

The same distinction was also recognized in *Langdon v. Railroad Co.*, 9 N. Y. S. 245. There an action was brought in New York based on a Pennsylvania statute which prohibited a railroad from charging one shipper more than another. The court pointed out the difference between the allegations necessary to enable a recovery in each class of cases, and distinguished the *Killmer* case on the ground that the rates were not fixed by statute.

In *Armour Packing Co. v. Edison Electric Illuminating Co.*, 100 N. Y. S. 605, 609, plaintiff sued to recover back moneys paid defendant for electricity for lighting purposes in excess of sums charged to others for similar services. The court distinguished the *Killmer* case, and said: "There the plaintiff based his claim entirely upon an excessive and unreasonable charge and it was not at all founded on the theory of an unjust discrimination."

In *Pingree v. Mutual Gas Co.*, 107 Mich. 156, 65 N. W. 6 (1895)

supra, the court said: "A distinction may well be made between cases depending upon the common-law duty to carry goods at a reasonable compensation and those where, by the statute, the rate is fixed by comparison, or discrimination is prohibited. In the latter class of cases the facts are peculiarly within the knowledge of the company fixing the rate, and the presumption indulged by the party making the payment would naturally be that the statute was being complied with. * * * In *Killmer v. Railroad Co.*, 100 N. Y. 395, there was no statute fixing the rate, or rendering the charges unlawful. * * * The court in that case distinguished it from the cases arising under charter clauses or statutes prohibiting discrimination or fixing rates."

In *Salt River Valley Canal Co. v. Nelssen* (Ariz.) 85 Pac. 117, suit was brought to enjoin a public water company from charging excessive rates and to recover back excess rates. The court said: "It is clear in reason and is well settled by precedents that where statutes prescribe maximum rates, one from whom a rate has been exacted in excess of the legal maximum may sue for the excess." See also *Directors, etc. Great Western Ry. Co. v. Sutton*, L. R. 4 Eng. & Irish App. Cases, 226; *Hilton Lumber Co. v. Atlantic Coast R. Line* (N. C.) 53 S. E. 823; *Great Southern & Western Ry. Co. v. Robertson*, 2 L. R. Ireland, 548.

In *Potomac Coal Co. v. C. & P. R. R. Co.*, 38 Md. 226, plaintiff sued to recover monies exacted by the defendant for freight in excess of the rates charged other persons. A recovery was denied on the ground that the money was voluntarily paid. The excess rates were not prohibited by statute. The case was cited, but not followed, in the following cases: *Pingree v. Mutual Gas Co.*, 107 Mich. 156, 65 N. W. 6; *W. Va. Transp. Co. v. Sweetzer*, 25 W. Va. 434, 462; *Railway Co. v. Steiner*, 61 Ala. 559.

In *Monongahela Navigation Co. v. Wood*, 194 Pa. 47, an action was brought to recover back freight monies paid in excess of a reasonable rate. A recovery was denied.

The following cases can also be classed as "reasonable rate" cases or as cases in which no statutory rate was involved: *Strough v. Railroad Co.*, 87 N. Y. S. 30, 92 App. Div. 584; *Bernhardt v. C. & N. W. R. Co.*, 135 N. C. 258, 47 S. E. 427. See also 2 Rapalje & Mack's Digest of Railway Law, 630, where the cases are classified.

B. CONTRA CASES INVOLVING STATUTORY RATES.

In *Kenneth v. Railroad Co.*, 15 Rich. Law, 284, 98 Am. Dec. 382, it was held no action would lie to recover freight charges in excess of the legal rate, the payment having been made after the goods had been carried and delivered, and without objection, protest or notice of discontent.

In *Arnold v. Railroad Co.*, 50 Ga. 304, the plaintiff sued to recover an overcharge for the carriage of certain cotton. It was claimed

that the rates charged were in excess of the rates allowed in the company's charter, which was of doubtful construction. The court held that the payments were made under mistake of law and could not be recovered back. The case is cited, but not followed, in the following cases: *Pingree v. Mutual Gas Co.*, 107 Mich. 156, 65 N. W. 6; *Railroad Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311.

(Circuit Court of Cook County. In Chancery.)

Elmer E. Beach, et al.

vs.

Chicago Telephone Company.

(October 17, 1906.)

1. **RATES FOR TELEPHONE SERVICE—POWER OF COURT TO FIX.** The court has no power to fix reasonable rates and charges for services performed by a public utility company.
2. **TELEPHONE COMPANIES—RIGHT OF SUBSCRIBER TO ATTACH OWN EQUIPMENT.** A provision in a contract between a telephone company and its subscriber that the subscriber shall not attach to the telephone company's wires any equipment or apparatus, not furnished by such company, is a valid regulation, and the subscriber is not justified in installing his own equipment.
3. **SAME.** This is true even though such attachments do not interfere with the company's service, as a multiplication of such attachments might seriously interfere with the efficiency of the service.
4. **SAME—UNREASONABLE CHARGES FOR INSTALLATION OF EXTENSIONS.** Nor is it material that the telephone company makes unreasonable charges for the installation of such attachments.
5. **SAME—INJUNCTION.** The subscribers are entitled to an injunction restraining the telephone company from interfering with their telephone service, conditioned, however, upon such subscribers removing the foreign attachments from their telephone.

Bill for injunction. Gen. No. 246,129. Heard before Judge Thomas G. Windes.

Statement of facts.

The bill was filed by complainants to restrain the defendants from interfering with the complainants' telephone serv-

ice. The bill alleged that the complainants were engaged in the general practice of the law and for that purpose occupied certain offices in the city of Chicago; that the defendant was organized to conduct a telephone business and operated in the city of Chicago under a certain ordinance from the city prescribing the rates for telephone service; that said defendant has a monopoly of the telephone business in said city; that said defendant required its subscribers to enter into a contract providing for the installation of the telephone service, under which contract the subscriber agreed to pay the sum of \$175.00 a year; that said contract contained a number of conditions, among them a condition as follows:

“The lessee agrees not to make, permit or use any electrical or mechanical connections, contrivances or apparatus with the lines, instruments and equipment furnished by the lessor, without the consent of the lessor.”

The said defendant also furnished to its subscribers what is known as an extension or branch telephone, by which the subscriber could talk over the telephone wire through said extension without going to the main telephone; that said complainants made application to the defendant for the installation of such extension, but it refused to do so unless complainants would pay certain charges for the same; that said charges were unreasonable and extortionate; that complainants then made application to an independent electrical company for the installation of said extension apparatus, and said electrical company installed the same and made connection with said defendant's wires; that the instruments and equipment furnished by said electrical company were in every respect as desirable and as efficient and practicable as those furnished by the defendant, and are made of as good material and constructed in a thoroughly workmanlike manner; that by the use of said extensions, the use of said defendant's wires is not in any way increased as but one person can use the telephone at the same time; that after the installation of said extensions, said defendant's agents entered complainants' offices, and cut the wires which connected said switch board and extension of complainants, with the defendant's wires,

and thereupon threatened to entirely discontinue complainants' service if said wires were again connected; that thereupon said complainants applied to defendant for permission to attach its extension system to said defendant's system, and offered to pay a reasonable price for such permission, but said defendant refused to permit said connection under any condition whatever; that the attaching of said system to defendant's system does not in any way affect the service of the defendant, except to render it more efficient, and does not impose any additional burden on said company or its service, and does not in any way cause it additional expense, labor or time, nor does it require the use of any more or different circuit or service but is a saving of time to said complainants and said defendant; that the use of said system does not interfere with defendant's service, or that of any of its patrons; that complainants are willing that said defendant should keep said system in repair and have the oversight and care of same, and complainants offer to pay a reasonable charge therefor. The bill prays for an injunction to restrain the defendant from refusing to furnish service to complainants, and from interfering with the said equipment and telephone service, and also that the conditions of the contract with respect to the installation, etc., be declared illegal and void. A preliminary injunction was issued in accordance with the prayer of the bill. A demurrer to the bill was filed and withdrawn, and an answer filed.

The answer alleges in substance that the use of extension telephones greatly increases the difficulties of successful telephone operation; that a telephone exchange system is a most delicate structure requiring the utmost mechanical and electrical skill to keep it balanced, and the different parts in proper adjustment and relation to each other, and the greater the number of terminals and connecting wires, the greater the likelihood of interference and interruption of service; that it is necessary for successful telephone operation that all parts of the system should be under one control, and the instruments according to a common standard, and that the company responsible for the successful operation should have the

choice of instruments; that any arrangement giving subscribers the right to connect other apparatus to the defendant's equipment would result in disaster; that the installation of any extension increases the use of the telephone by affording additional convenience to the subscriber and increases the cost of operation to the defendant. Evidence was heard in open court to support the bill and answer, and the decision of the court was rendered on final hearing.

Beach & Beach, Smoot & Eyer and Julian C. Ryer, solicitors for complainants.

Holt, Wheeler & Sidley, solicitors for defendant.

WINDES, J.:—

As I understand counsel on both sides, they concede the law to be that this court can not in this case fix what it deems a reasonable rate,—am I right?

MR. MOORE: Yes.

MR. HOLT: So far as we are concerned, certainly.

THE COURT: Is that the way you look at it, Mr. Beach?

MR. BEACH: Yes.

THE COURT: I was in doubt all along in the case as to whether the court had any power with regard to the fixing of rates and inasmuch as counsel on both sides agree, I will not take the time to investigate the law on the question, inasmuch as I have so many different cases pressing upon me for hearing just now. Neither will I attempt to review the numerous authorities and arguments of counsel in the case. It is a very interesting case and I would be glad to do it, but there is a limit to my powers as well as the defendant's powers.

All through the trial of the case, it was a very uncertain question in my mind as to whether this contract which prevents the complainants in this case from making any foreign attachments to the defendant's wires was a valid contract and whether or not the rule of the company in that regard was a reasonable one, but after listening to all the arguments in the case, I think, considering the character of the service that the defendant company has to render, the extent of that service and especially the concession of complainants' counsel in

this case—and I think it was a reasonable concession in view of all the evidence in the case—that inferior instruments and improper installments would have a detrimental effect upon the service that the defendant is performing for the public here, the conclusion is justified that the contract is not an invalid contract, that the regulation of the company in that regard is not an unreasonable one, because to protect its service and make that service practical to its 117,000 subscribers here in Chicago, I think requires that the company not only have the right to inspect and repair all its apparatus but that it should have the complete control of the apparatus and should have the right, under reasonable regulations, to say whether or not there shall be any foreign attachments to its telephone system in the city. Of course, what would be a reasonable regulation in the case of attachment of foreign instruments does not arise in the case and the court could only determine that, I should think, upon a specific case made. And although I think the weight of the evidence is, in this case, that the complainants' foreign attachments do not seriously interfere with the defendant's service, it means a great deal more to the defendant to allow these complainants to attach instruments than is involved in this specific case. If the complainants are allowed to attach foreign instruments, then every other subscriber in the city would have the same right and I can see that that would be likely to produce at least very serious disturbance and perhaps very seriously affect the service of the remaining subscribers, even if a few thousand only did what the complainants did in this case. I will not go into the details of my reasoning in that regard; suffice it to say that I think the testimony of most of the witnesses—including several of complainants' witnesses—is such that the results which I have suggested are likely to follow. The arguments of counsel as to the details of the possibilities of the effect upon the service, I think are reasonable arguments.

I have no doubt, from the evidence which has been produced here, that the charge which the defendant is shown to have demanded of the complainants for extension instruments

is a very unreasonable charge. I base this upon the schedule of prices charged in other cities and upon the charges made by the defendant itself here in the city. But, inasmuch as counsel have conceded that this court has no right to determine what is a reasonable charge, there is no use of going any further in that regard.

If I am right in the position that the complainants under the contract and under the regulations of the company had no right to make the foreign attachments here, then this bill can not be maintained upon the theory that they have the right to have the status which was in existence at the time of the filing of this bill maintained and the injunction which was issued in that regard in the first instance made perpetual, or at least continued until some time and under certain conditions which it is claimed that the court might specify, because by reason of those foreign attachments the court has no right to give any relief. I think, however, that because the defendant has demanded of these complainants an unreasonable price for the extension instruments,—while because of that the complainants had no right by virtue of their contract and under the regulations of the company to make foreign attachments—they are not deprived of all right to protection in a court of equity. They have a contract here which allows them telephone service “unlimited,” I believe is the expression used in the contract, I have not looked at it—and since the defendant has done what seems to the court an unreasonable thing, I think that the complainants ought to be protected in their telephone service by the main instrument, notwithstanding these foreign attachments, if they will now comply with their contract and disconnect the foreign attachments. They would then be entitled to an injunction against the defendant from interfering with their telephonic service over the one instrument and I think that is the extent to which the court can go in this case. Because of that situation, I do not think it is necessary for the court to go into any discussion or decision as to whether or not there is a remedy at law here by way of *mandamus* to compel the defendant to do its duty and therefore that the complainant can have no

relief at all. So, I think that a decree should be entered in this case allowing the complainants an injunction protecting them in the use of their main instrument according to their contract on the condition that they disconnect the foreign attachments. That will be the decree of the court.

NOTE.

In *Gardner v. Providence Telephone Co.*, 23 R. I. 262, 49 Atl. 1004, 55 L. R. A. 113, it was held that a telephone company, though having a monopoly of the business in a particular city, may deprive a customer of service upon his refusal to discontinue the use, in connection with its wires on his premises, of extension instruments not furnished by it, where it is able and willing to furnish such instruments as efficient and convenient as the state of the art affords, upon reasonable terms. It was also held that if the company refuses to furnish extensions except at exorbitant rates, the subscriber has the right to install his own equipment.

(Circuit Court of Cook County. In Chancery.)

Richard J. Kehoe

vs.

Kehoe, et al.

(May, 1883.)

1. **TRUSTS—MASSES FOR THE SOUL—STATUTE OF FRAUDS.** The decedent deeded certain personal property, upon oral directions that the fund should be devoted to the procurement of masses for the soul of the decedent and his mother. *Held*, that the trust was not void because not wholly in writing, as the statute of frauds does not embrace trusts as to personal property, but only as to realty.
2. **MASSES FOR THE SOUL—SUPERSTITIOUS USES.** At common law gifts or devises for procuring masses are void, as being for superstitious uses.
3. **SAME—ENGLISH STATUTES.** The English statutes concerning the disposition of property for superstitious uses are inapplicable to our conditions and inconsistent with our institutions, and never became a part of our law. The origin of the Illinois statutes as to the adoption of the common law traced.
4. **SAME—RELIGIOUS BELIEF.** The right of a person to devote his property to what he conceives is a religious purpose, such as

the procurement of masses for the soul, is just as necessary to the religious liberty guaranteed by the constitution, as the right to believe and worship according to the dictates of one's own conscience.

5. SAME. A bequest for the procurement of masses for the donor's soul is a valid bequest.

Bill to obtain instructions of court as to complainant's duty as trustee. Heard before Judge Murray F. Tuley.

For statement of facts see opinion.

R. W. Clifford, for complainant.

A. Tripp, for respondent.

TULEY, J.:—

Richard J. Kehoe files his bill to obtain the instruction of the court as to his duty as trustee in reference to certain funds now remaining in his possession.

John W. Kehoe, a few weeks prior to his decease, made a deed to complainant of certain personal property, upon oral directions or trusts, which were in substance, that the funds should be devoted to the purpose of procuring masses to be said for the soul of the said John W., and for the soul of his mother, now also deceased.

The complainant is ready to carry out the wishes of the donor but the defendants—who would take as legal representatives of the deceased, if no such disposition thereof had been made—contend that the trust is void because it is not wholly in writing; and if it is not void for that reason, that it is void because the funds were given for a superstitious purpose or use.

The statute of frauds is relied upon to sustain the first objection, but as that statute does not embrace trusts as to personal property, but only as to realty, the point is not well taken.

As to the second point, the defendants contend that as our state has adopted the common law and statutes of England prior to fourth year of James I, excepting certain specified statutes concerning usury and frivolous suits (see Revised Stat. Chap. 28) that the decisions of the English courts based

upon the statute, 1 Edward VI, holding that gifts or devises for procuring masses, etc., are void, as being for superstitious uses, will be followed by the courts of this country.

Redfield in his learned treatise on the law of wills, after stating the doctrine, as above, of the English courts says, "we understand this to be the general view of the law in the American states." 2 Redfield on Wills, sec. 3, ch. 5, etc.; Story's Eq. sec. 1168. Other text writers take the opposite view, and hold that the American courts should not follow the English courts in their decisions as to what are superstitious uses. Perry, Trusts, sec. 715; Hill, Trustees, note p. 455; Williams, Executors, p. 1055.

No American decisions of courts of last resort have been cited by any of the text writers, and the researches of counsel in this case, as well as my own, have failed to find any.

How did this doctrine of superstitious uses originate, and upon what is it founded?

Two English statutes were passed about the period of the reformation, concerning the disposition of property for uses then considered superstitious. The first was that of 23 Henry VIII, A. D. 1532, which was about four years after the clergy had acknowledged Henry VIII to be the supreme head on earth of the church, which provided that all uses thereafter declared of land (except leaseholds of 20 years) to the intent to have perpetual, or the continual service of a priest, or other like uses, to be void; and the 1st Edward VI, chap. 14, A. D. 1547, declared the king entitled to all real and certain specified personal property theretofore disposed of for the perpetual finding of a priest or maintenance of any anniversary or obit, or other like thing, or any light or lamp at any church or chapel.

These statutes were passed at a very troubled period of English history in religious matters. Henry VIII had just severed the connection between the English church and the pope at Rome, and had united to the kingly power, that of the head of the church.

While these two statutes were aimed at the practices of the Catholic church, yet the Catholic who denied the supremacy

of the king as the head of the church, and the non-conformist were alike persecuted, not only by religious edicts, but by all the power that parliament could exercise in favor of the newly established church.

It will be noticed that there was no statute making dispositions of personal property to such uses void; that while the 23d of Henry VIII, was prospective, it only applied to assurances of land to churches and chapels, and that of 1st Edward VI, was limited to dispositions of property real and personal theretofore made.

Nevertheless, the English chancellors, many of the earlier of whom were ecclesiastics, and the English judges being always adherents of the established church, and undoubtedly imbued with that religious feeling which had induced such legislation, easily found in the absence of any express statute, what they termed "a public policy" or "a policy of the law," which enabled them to declare absolutely void all dispositions of property, whether real or personal, given or devised for the uses specified in the two statutes—or for uses which they deemed to come within the spirit of the statutes—such as "legacies to priests to pray for the soul of the donor." "For the bringing up of poor children in the Roman Catholic faith," etc. *Attorney General v. Powers*, 1 B. & B. 145; *West v. Shuttleworth*, 2 M. & K. 684; *In re Blundell's Trust*, 31 L. J. Eq. 52; *Cary v. Abbott*, 7 Vesey, 490; *Rex v. Lady Portington*, 1 Salk., 162, in 4 Wm. & Mary; *De Themmines v. De Boneval*, 5 Russell, 289.

When judges undertake to decide cases not upon the law, but upon what they consider "public policy," or the "policy of the law," they stand upon very slippery ground. This is strikingly exemplified by the strange inconsistency of the English decisions as to what are superstitious uses, one vice-chancellor, upon the ground of public policy holding a devise for the purpose of aiding in the publication and circulation of "Baxter's Call to the Unconverted," to be void because for a superstitious use; while Lord Romilly held upon the like ground of public policy, that a trust for propagating the sacred writings of Joanna Southcote valid, and not for

a superstitious use, notwithstanding these writings averred that Joanna Southcote was with child by the Holy Ghost. *Attorney General v. Baxter*, 1 Ver. 248; *Thornton v. Howe*, 31 Beav. 14.

The Irish chancery courts, uninfluenced by any consideration of a "public policy" to oppose Catholicism, have not followed the English courts, but have held, in two cases, devises of personal property to procure masses to be said for the soul of the donor to be valid. *Read v. Hodgins*, 7 Irish Eq. 17; *Com'rs v. Walsh*, 7 Irish Eq. 34 and note.

The history of this statute of ours adopting the common law and statutes of England, and of the country at the time of its adoption, should also be considered in determining whether or not the statutes 23d Henry VIII and 1st Edward VI, ever became a part of our law; and if they did, whether or not the decisions of the English courts as to superstitious uses should be followed in this country.

In May, 1774, the people of Virginia assembled in a convention to sever the political relations that bound them to the mother country. The celebrated bill of rights and constitution of the commonwealth of Virginia was then adopted. The convention adopted several ordinances deemed necessary to the changed relations, and among others, one adopting the common law and statutes of England prior to 4th year James I. The reason why that date was fixed upon was, I presume, because in that year 1607 the first permanent settlement of Virginia was made, at Jamestown; the theory being that the colonists brought with them the common law and statutes as it then existed.

"From the first the colonists of America claimed the benefit of the common law. * * * The acts of parliament passed after the settlement of a colony, were not in force therein unless made so by express words or by adoption." Cooley, Const. Lim. 23 and note.

Although the established church of England was by law that of Virginia from its earliest colonial days, the same convention that adopted the ordinance, also adopted a provision in the bill of rights which declared "that all men are equally

entitled to the free exercise of religion according to the dictates of conscience, and that it is the mutual duty of all to practice christian forbearance, love and charity toward each other."

It is apparent that the sentiment of the convention was in favor of absolute freedom in religion.

The history of the colonies and of the then passing events, teach us that it was the sentiment and policy of the country. The war for independence was raging and Catholic Maryland and Episcopal Virginia were then fighting side by side the great battle for both civil and religious liberty.

This statute, Revised Statutes, ch. 28, was first adopted in 1807, by the territory of Indiana, which then embraced the now states of Illinois and Wisconsin. The northwestern territory, once a part of Virginia, was largely settled by that people and that fact probably is the reason why the Virginia statute was adopted. Illinois was then an almost uninhabited wilderness, and the 23 Henry VIII and 1 Edward VI, could have no applicability. The present statute was adopted in Illinois in 1819.¹

It may, "upon authority," be contended that because of inapplicability and inconsistency with our institutions the statutes referred to never became a part of our law. 1 Jarman on Wills, 386; *Carter v. Balfour*, 19 Ala. 814.

But even admitting that they did become by adoption a part of our law, yet it must be conceded, considering the history of this statute, adopting the statutes of England, and of contemporaneous events in Virginia and Illinois at the time of its passage, that neither Virginia or Illinois intended to adopt the doctrine of the English courts as to superstitious uses as a part of their laws.

The question being freed from the force of "precedents" must be decided upon principle.

In the United States, where no discrimination is made in law between the professions of any particular religious creed; where there is an absolutely free toleration of all religious

¹ Laws of Illinois, 1819, p. 1.

opinions and modes of worship, can any such thing as a superstitious use be said to exist?

Who is to decide whether or not a use, as connected with the religious belief of the donor is, or is not superstitious? Must it be decided according to the sectarian views of the chancellor?

Nor is the question here, whether or not the doctrine of a purgatory is well or ill founded; or whether or not masses for the souls of the departed are efficacious.

Who can penetrate the life beyond and say that there is no purgatory? This property was appropriated by the donor to a use in accordance with his religious belief. That there is a purgatory, and that masses for the souls therein are efficacious, is a part of the belief of those professing the Catholic religion.

In the formulary of faith of Pius IV, which is still that of the unchangeable church, and which persons becoming members of the church are expected to give their adhesion to, I find the following:

“I profess likewise that in the mass there is offered to God a true, proper and propitiatory sacrifice for the living and the dead. * * * I firmly hold that there is a purgatory and that the souls therein detained are helped by the suffrages of the faithful.”

This being the donor's belief, why should not his desires be carried out? It has become a maxim of the law that a man may do what he will with his own. The only limitations are that he does not violate the law in so doing, nor devote his property to an immoral purpose. A person may gratify any whim or caprice, religious or irreligious, that he may desire. With the wisdom of his act the law has no concern. The legislature has not declared such a disposition of this property illegal.

Neither the legislature nor the court has the power to declare that any religious use is a superstitious use.

With us there is a legal equality of all sects, all are equally orthodox. To discriminate and say what shall be considered a pious use, and what a superstitious use would be to infringe

upon the constitutional guarantee of perfect freedom and equality of all religions.

The right of a person to devote his property to any purpose which he believes to be a religious purpose, is just as necessary to the religious liberty guaranteed by the constitution, as is the right to believe and worship according to the dictates of one's own conscience.

The wish of the donor must be followed, and the funds appropriated to the procuring of masses to be said in accordance with his instructions.

NOTE.—As to bequest for the procurement of masses for the soul, see note in 25 L. R. A. 360, and also 5 Wis. Leg. News, 416.—Ed.

(Circuit Court of Cook County.)

People

vs.

Richards & Kelly Manufacturing Company.

And fifty-six other similar cases.

(December 12, 1900.)

1. **STATUTES—REPEAL BY IMPLICATION.** In 1891 the legislature passed an act in reference to trusts and combines. In 1893 this act was amended by adding two new sections. On the same day the legislature passed an entire new act upon the same subject. *Held*, that the act of 1893 did not repeal the act of 1891, as such was not the intention of the legislature.
2. **CONSTITUTIONAL LAW—CLASS LEGISLATION.** In 1897 the legislature amended section one of the act of 1891 by adding a proviso, that in the mining, manufacture or production of articles of merchandise the cost of which is mainly made up of wages, it shall not be unlawful to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages:

Held (1) That section one as amended was in effect an amendment of the General Incorporation Law, and operated as an amendment of some but not all of the charters of the

corporations incorporated under that law and therefore was prohibited by section 2, article 2, of the constitution of 1870.

(2) That section one as amended was unequal and partial legislation forbidden at common law and in violation of the constitution of the state, and of the 14th amendment to the Federal constitution, which prohibits a state from denying to any person the equal protection of the laws. One judge dissenting upon the proposition that the entire section was void on account of the unconstitutional proviso.

3. **CORPORATIONS—RESERVED POWER TO REGULATE.** Nor can the act be justified by the provisions of section 9 of the General Incorporation Law, which reserves to the general assembly the power to regulate all corporations formed under the act. The legislature has the right to classify all corporations, but such classification must not arbitrarily discriminate between corporations in substantially the same situation.
4. **STATUTORY CONSTRUCTION.** In construing statutes the intention of the legislature is to be deduced from every part of the statute.
5. **CONSTITUTIONAL LAW—EXEMPTION OF BUILDING AND LOAN ASSOCIATIONS.** The exemption of building and loan associations from the operation of a law requiring corporations to make an annual report that they are not a party to a trust or combine is not an arbitrary classification and does not invalidate the law.
6. **EVIDENCE—SELF-INCRIMINATION—IMMUNITY.** Where the officers of a corporation are compelled to file an affidavit that the corporation is not a member of any trust or combine, and it is provided that no corporation or individual shall be subject to any criminal prosecution by reason of anything truthfully disclosed by such affidavit, the immunity clause is sufficiently broad to protect the corporation and its officers, and such law is not obnoxious to the provisions of section 10, article 2, of the Illinois constitution, which provides that no person shall be compelled in any criminal case to give evidence against himself.
7. **SAME—CRIMINAL CASE.** The term "criminal case" is broad enough to include any prosecutions for penalties or forfeitures.
8. **CONSTITUTIONAL LAW—EFFECT OF UNCONSTITUTIONAL SECTION.** The fact that one or more sections of a law are unconstitutional does not affect the entire law where the remaining sections make a complete law in themselves.

Actions of debt. Gen. No. 200,636 *et seq.* Heard on demurrer before Judges Arba N. Waterman, Murray F. Tuley and Edward F. Dunne sitting *en banc*.

Statement of case by court.

This is an action of debt brought under what is known as the anti-trust statute to recover the penalty of \$50 per day for the failure of one of the defendant's officers to make answer to the letter of inquiry of the secretary of state as to whether the corporation had become a member of any trust, combination, etc.

In 1891 an act was passed by the general assembly, entitled "an act to provide for the punishment of persons, copartnerships or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases."

Section 1 of that act, in substance, provided that if any corporation, partnership, individual or other association of persons should create or enter into and be a member of or a party to any pool, trust, agreement, combination, etc., "with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act." Other sections of the act imposed certain fines and penalties for violation of the act, running from \$500 to \$10,000, and authorized the recovery of the fine by an action of debt in the name of the people of the state of Illinois.

In 1893, on the 20th of June, a law was approved amending the act of 1891 by adding to it two sections, one known as section 7a, and the other as section 7b.

Section 7a provided, in substance, that "it shall be the duty of the secretary of state, on or about the first day of September of each year, to address to the president, secretary or treasurer of each incorporated company doing business in this state, etc., a letter of inquiry as to whether the said corporation has all or any part of its business, or interest, in or with

any trust, combination or association of persons or stockholders, as named in the preceding provisions of this act, and to require an answer under oath of the president, secretary or treasurer, or any director of said company," a form of affidavit, to be enclosed with the letter of inquiry as set out in the section. And, further provides that "on refusal to make oath in answer to said inquiry, or on failure to do so within thirty days from the mailing thereof," it shall be the duty of the secretary of state to certify the fact to the attorney general, whose duty it shall be to direct the state's attorney of the county wherein such corporation is located, and it shall be the duty of the state's attorney at the earliest practicable moment, in the name of the people, to proceed against such corporation, "for the recovery of a penalty of \$50 for each day after such refusal to make oath or failure to make said oath within the thirty days from the mailing of said notice." Or, that the attorney general may "by any proper proceedings in a court of law or chancery, proceed upon such failure or refusal to forfeit such charter of such incorporated company * * * and to revoke the rights of any foreign corporation located herein to do business in this state."

Section 7b, in substance, provided that the secretary of state at any time, if satisfactory evidence came to him that "any company or association of persons * * * has entered into any trust, combination or association in violation of the preceding section of this act, to demand that it shall make the affidavit as above set forth in this act." (Section 7a.)

Then follows a saving clause as follows: "Provided, that no corporation, firm, association or individual shall be subject in any criminal prosecution by reason of anything truthfully disclosed by the affidavit required by this act, or truthfully disclosed in any testimony elicited in the execution thereof." And contains the further proviso, "Provided that corporations organized under the building, loan and homestead association laws of this state are excluded from the provisions of this act."

In 1897 another amendatory act was passed providing that

section 1 of the act of 1891 should be amended to read as follows:

“Section 1. Be it enacted by the people of the state of Illinois represented in the general assembly: That section one of an act entitled, ‘an act to provide for the punishment of persons, partnerships, or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases,’ approved June 11, 1891, in force July 1, 1891, be amended to read as follows: If any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or any partnership or individual or other association or persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person, or association of persons; to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to indictment and punishment as provided in this act;” and concluding with the following proviso (the addition of which proviso was the only change made in the section):

“Provided, however, that in the mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages, it shall not be unlawful for persons, firms or corporations doing business in this state to enter into joint arrangement of any sort, the principal object or effect of which is to maintain or increase wages.”

On the same day that amendment to the act of 1891 was passed, to-wit: the 20th of June, 1893, the legislature passed an act entitled, “an act to define trusts and conspiracies against trade,” declaring contracts in violation of the provi-

sions of this act, and making certain acts in violation thereof misdemeanors and prescribing the punishment therefor, etc.

Charles S. Deneen, state's attorney for the People.

Levy Mayer, for defendants.

The court after making the foregoing statement rendered the following opinion:

PER CURIAM:—

The demurrer to the declaration in this case raises the question of the constitutionality of the trust act of 1891, as amended by the acts of 1893 and of 1897, respectively, and whether the trust act of 1893 does not repeal the trust act of 1891.

It is contended that an act passed in 1893 defining "trusts and conspiracies against trade," etc., which it is alleged is a revision of the entire subject matter of trusts and conspiracies against trade, operates as a repeal of the act of 1891.

That the legislature did not intend such an effect is manifested by the fact that at the same session, on the same day, the act of 1891 was amended by adding two sections, to-wit: section 7a and section 7b, and that the legislature again in 1897 amended the act of 1891, treating in both amendments the act of 1891 as being in full force and effect.

It will be observed as a singular fact that while the act of 1893 defines trusts and conspiracies, etc., it does not in express terms prohibit the entering into or forming of such trusts and conspiracies. Sections 2, 3, 4 and 5 of this act prescribe certain penalties for violations of the act. As nothing is either commanded or prohibited therein, there can be no violation thereof. Except as an act defining a trust, it is an unique specimen of legislative abortion.*

We see no difficulty in construing the act of 1891, as amended, and the act of 1893, defining trusts and conspiracies, so that they can both stand, and are of opinion that there is not any fatal repugnance between the two.

*NOTE.—The act of 1893 was declared unconstitutional by the United States supreme court in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.—Ed.

Section 1 of the act of 1891, as amended in 1897, is unconstitutional and void for the following reasons:

First. Because, in its legal effect, it is an amendment of the general incorporation law authorizing the formation of corporations (chap. 32 of the Rev. Stat., entitled "an act concerning corporations"), and operates as an amendment to the charters of some, but not all, of the corporations incorporated under said general law, and, therefore, is a special law, prohibited by sec. 2, art. 2, of the constitution of 1870, which prohibits the creation, change, or amendment, by special law, of the charter of any corporation, excepting those for charitable, educational, penal or reformatory purposes.

By the same section (1), it is provided that "the general assembly shall provide by general laws for the organization of all corporations hereafter created."

In the general law passed in pursuance of that requirement of the constitution, there was in section 9 of the act a reservation as follows:

"The general assembly shall have at all times power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding upon any and all corporations formed under this act."

Our supreme court has held that this general power must be exercised by general law, and cannot be exercised by a special law. *Braceville Coal Co. v. People*, 147 Ill. 66.

It is, however, urged on behalf of the plaintiff that the general assembly has the power to classify corporations for the exercise of the reserved power; to prescribe "such regulations and provisions as it may deem advisable," and also for the exercise of the police power of the state, and that section 1 of the act of 1891, as amended, is a proper classification of corporations for either of such purposes.

The power of the general assembly to classify corporations must be admitted, but is the classification contained in section 1 a proper or legal classification for either of such purposes?

The amendatory act of 1897 re-enacts, word for word, sec-

tion 1 of the act of 1891, and adds thereto the following proviso:

“Provided, however, that in mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages, it shall not be unlawful for persons, firms or corporations doing business in this state to enter into joint arrangements of *any sort*, the principal object or effect of which is to maintain or increase wages.”

While the general assembly has the power to classify corporations for the exercise of the reserved power contained in section 9 of the corporation act, or for the exercise of the police power of the state, and to determine what is a proper classification for such purposes, yet its determination is subject to review by the courts. *Frorer v. People*, 141 Ill. 171.

The power of the general assembly to classify corporations for either of the purposes aforesaid is subject to the limitation that such classification must not arbitrarily discriminate between corporations in substantially the same situation, and such determination must rest upon reasonable grounds. Arbitrary selection cannot be justified by calling it classification. *Gulf C. & S. F. R. R. v. Ellis*, 165 U. S. 150.

Section 1 of the trust act, as amended by the act of 1897, makes the attempt to separate certain mining and manufacturing corporations from all other corporations and to withdraw them from the operation of an act to which the latter are subject.

It is clearly an arbitrary discrimination between corporations, substantially of like character, objects and purposes, and no reason can be perceived why mercantile or transportation of other corporations organized for pecuniary profit should be prohibited from entering into any pool, trust or combination in restraint of trade, or to regulate prices of commodities, while mining and manufacturing corporations producing merchandise, the cost of which is mainly made up of wages, should be permitted to enter into joint arrangements of any sort, the effect of which should be to increase or maintain wages. Such a combination by either class would be equally injurious to the public.

Section 1, as amended, discriminates, not only between mining and manufacturing corporations, and all others, but also discriminates between mining and manufacturing corporations engaged in the same business. It divides them into two classes, those the cost of whose output or merchandise is mainly made up of wages; and those the cost of whose output is not mainly made up of wages.

The cost of the output of one manufacturing corporation may be made up of fifty-one per cent. wages, while that of another may contain only forty-nine per cent. of wages. This law permits the former (fifty-one per cent.) to enter into any sort of combination and denies the right of the latter (forty-nine per cent.) to do so. The fluctuations in the price of the raw material might change them from time to time from one class to the other, and thus their rights be determined by the fluctuations of the market for the raw material used by them, respectively.

The classification is one of degree, of the cost of raw material and labor, respectively, and is not based upon any reason or principle.

Second. Section 1, as amended, is unconstitutional for the further reason, that it is unequal and partial legislation which was forbidden at common law and cannot be sustained upon any principle of right or justice.

Says Judge Cooley, "and, if the legislature should undertake to provide that persons following some specific trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others are allowed to erect, or in any other way *to make such use of their property* as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property, in such manner as should be permitted to the community at large, would be to deprive them of *liberty*, in particulars of primary importance to their 'pursuit of happiness,' etc." Cooley, Constitutional Limi-

tations, 561. The same writer, in the same section, speaks of "Equality of rights, privileges, and capacities" as a "fundamental maxim of government."

Legislation of this character making *arbitrary* classifications and discriminations between persons or classes has been repeatedly held to be in violation of sec. 2, art. 1, of the state constitution.

"No person shall be deprived of life, liberty or property without due process of law." The words "due process of law" in this connection are held to be synonymous with "the law of the land."

And this means general public law binding upon all the members of the community under all circumstances and not partial or private laws affecting the rights of private individuals, or classes of individuals. *Millett v. People*, 117 Ill. 294. See also *Frorer v. People*, 141 Ill. 171.

In the latter case the court says of the law under consideration in that case, "the same act 'in substance and in principle, if done by the one' is lawful, but if done by the other is not only unlawful, but is a misdemeanor punishable by fine," and holds the law unconstitutional; also holds that "under the guise of the police power a person cannot be deprived of a constitutional right," and that "it is impossible that under that power what is lawful if done by A, if done by B, can be a misdemeanor, the circumstances and conditions being the same." Among the decisions in this state, holding legislation of this character unconstitutional, may be cited the following: *Braceville Coal Co. v. People*, 147 Ill. 66; *Ritchie v. People*, 155 Ill. 98, and the decisions upon the Barbers' Act; *Eden v. People*, 161 Ill. 296.

Such a law violates the 14th amendment to the Federal constitution, which prohibits a state from denying "to any person equal protection of the laws." *Gulf C. & S. F. R. R.*, 165 U. S. 150; *In re Converse*, 137 U. S. 624; *Low v. Rees Printing Co.*, 41 Neb. 127, 59 N. W. 362; *Luman v. Hitchens*, 90 Md. 14, 44 Atl. 1051.

Two of the judges are of the opinion that section one must be held to have been amended by the Act of 1897, and that

as amended, it must be held unconstitutional and void for the reasons before stated.¹

The principle of construction requires the sound interpretation and meaning of the statute, taking into consideration the enacting clause, the saving clause and provisos together with the title of the act. The intention is to be deduced from the whole and every part of the statute taken and compared together. *People v. Gaultier*, 149 Ill. 39; *Dupee v. Swigert*, 127 Ill. 494; *Mason v. Finch*, 2 Scam. 223; *Davis v. Hayden*, 3 Scam. 35; *People v. I. & M.*, 3 Scam. 153; *Belleville v. Gregory*, 15 Ill. 20; *Zarresseller v. People*, 17 Ill. 101; *Way v. Way*, 64 Ill. 406.

The other of the three judges holds as follows:

That the question as to whether section 1 of the act of 1891 is still in force is not necessary to a decision of the demurrer to the declaration in this case.

Also, that—as shown elsewhere in this opinion—all the virus of unconstitutionality of this trust act is to be found in the “proviso” contained in the amendment of 1897, and that section 1 may be preserved by holding the entire amendatory act of 1897 unconstitutional and void, or that the “proviso” may be rejected, because repugnant to the purview of the act or section, and cannot stand without rendering the act (or section) inconsistent and destructive of itself. The result would be the same in either case—that part of the law which is not obnoxious to the constitution stands,—while that part which infringes it is repealed. An amendatory act, which is unconstitutional and therefore void, should not be held to affect an original act which is constitutional. A void thing is no thing and can have no effect whatever.²

The judges concur in the opinion that the exemption of the loan and homestead association contained in the proviso to

¹ In so far as the court holds that the entire section as amended is void the decision is clearly erroneous. An unconstitutional amendment can have no effect on the original law.—Ed.

² The amendment of 1897 was afterwards declared unconstitutional in *Butler Street Foundry and Iron Co. v. People*, 201 Ill. 236.—Ed.

sec. 7b in the amendatory act of 1893, does not affect the validity of the act of 1891 as amended by the amendment of 1893.

That proviso must be held limited in its effect and operation to the provisions of the amendatory act, sec. 7a and sec. 7b. *De Graff v. Went*, 164 Ill. 485.

This construction will exempt loan and homestead associations only from the duty to make reports as required in such amendatory act. Loan and homestead associations are a class to themselves, different in many particulars from all other corporations. The general assembly has legislated for that class and has taken such supervision over them as rendered it in its opinion unnecessary that such associations should be brought under the operation of the act of 1891 as amended in 1893. The exemption or classification is not arbitrary and was within the power of the legislature. See the *Commission Merchant* case, 183 Ill. 226 (*Lasher v. People*).

It is contended by the defendants that the amendment made in 1893, sec. 7a, violates sec. 10 of art. 2, of the constitution, "No person shall be compelled in any criminal case to give evidence against himself."

This is substantially the same as the fifth amendment to the Federal constitution, "Nor shall any person be compelled in any criminal case to be a witness against himself."

There can be no doubt under the authorities as to the correctness of this position, unless the clause of the act granting immunity is broad enough to prevent any prosecution for penalties or forfeiture in any proceeding at law or equity founded upon or growing out of disclosures made by the affidavit required by said sec. 7a to be made in response to the letter of the secretary of state. The immunity clause under the statute is in the following language: "No corporation, firm, association or individual shall be subject to any criminal prosecution by reason of anything truthfully disclosed by the affidavit required by this act, or truthfully disclosed in any testimony elicited in the execution thereof."

In our opinion this clause is broad enough to protect the corporation and officer or officers making the affidavit, not

only against any criminal prosecution, strictly speaking, but also against any prosecution to collect any fine, or against any action of debt to recover any penalty, or against any proceeding at law or in equity to enforce a forfeiture of the charter of the corporation, which may be brought by reason of anything truthfully disclosed in the affidavit required in the act, or disclosed in any testimony elicited in the execution thereof.¹

Whether the action or proceedings be in form criminal or civil, it is immaterial if it be brought to punish the corporation or the official; if the end sought is punishment the action or proceeding is *ex delicto* in its nature, and it may be classed as a criminal proceeding, whatever its form. *Boyd v. United States*, 116 U. S. 616, *Coffey v. United States*, 116 U. S. 436; *Counselman v. Hitchcock*, 142 U. S. 547; *Brown v. Walker*, 161 U. S. 591.

Our attention has been called to the case of *State of Missouri v. Simmons Hardware Co.*, 109 Mo. 118, 18 S. W. 1125, where a trust act was construed containing sections—it is alleged—of which the present section (7a) is a copy, in which case the court held the act unconstitutional, but we are unable to find that the Missouri statute contained any immunity clause whatever and is therefore not in point.

It is, however, contended by counsel for the defense that under this construction, if a corporation (or one of its officials) makes a report under the statute, showing it to be a party to a combination in restraint of trade, or to be in a trust, instant the crime is disclosed, the corporation or official is absolved from all liability to punishment, criminal, penal or forfeiture. This may be true and it may further be true that the legislative department supposed the benefit to accrue from publicity of the crime would be sufficient. It is for the general assembly to decide upon the wisdom or policy of such legislation and not for the courts.

But assuming that section 1 of the act of 1891, as amended

¹ The same conclusion was reached in *Butler Street Foundry and Iron Co. v. People*, 201 Ill. 236.—Ed.

by the amendment of 1897, is unconstitutional, and therefore void, it does not follow that the whole act falls to the ground.

The proviso which, in the opinion of the court, makes section 1 unconstitutional, is declared by the legislature to be an amendment to section 1 and must be construed as applying only to section 1. "A proviso must be construed to qualify what is affirmed in the body of the act, section or paragraph which precedes it." *Boone v. Juliet*, 1 Scam. 258.

Eliminating section 1 from the act as unconstitutional and section 4, which fixes penalties for violation of section 1, there still remain sections 2, 3, 5, 6, 7, 7a, 7b and section 8.

These sections, with the caption or title of the act, make a complete law in themselves, and do not seem to be open to the objections which we have noticed in connection with section one.

Section 2 provides that it shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employes, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured products thereof, in the hands of any trustee or trustees, *with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.*

Section 3 provides penalties for any violation of the act.

Section 5 makes any contract or agreement in violation of any of the provisions of the act absolutely void.

Section 6 declares that any purchaser of any article or commodity from any corporation transacting business contrary to the preceding section, shall not be liable for the price thereof.

Section 7 provides a method for the recovery of the fines imposed.

Section 7a provides for reports to be made to the secre-

tary of state, and provides penalties for the refusal of a corporation to make such report.

No constitutional objections have been urged by counsel for the defense to any of these sections, save and except the objection made against section 7a; that it compels a corporation, in violation of the constitution of the United States and the state of Illinois to give evidence against itself.

This objection, as we have before pointed out, is removed by the immunity clause contained in the section. If complete immunity is afforded the corporation and its officers we can see no reason why, under the power reserved by the state in section 9 of the corporation act, the legislature cannot prescribe, in the exercise of the police power, a regulation requiring corporations to make the reports called for by section 7a of this act. Because one section of the statute is unconstitutional it does not follow that other sections of the same act, which are within the powers given by the constitution, should not be enforced. *Nelson v. People*, 33 Ill. 390; *Donnersberger v. Prendergast*, 128 Ill. 229.

The general assembly may impose the duty upon any officer of a corporation to make report of its affairs and doings to the same extent it could impose such duty upon the corporation, and may make the corporation liable for the failure of such official to perform such duty.

For the purposes of this demurrer, it is sufficient to hold that section 7a (of the amendment of 1893), which imposes the duty upon certain officials to make answer to the letter of inquiry of the secretary of state, remains in force, and that the action of debt will lie to enforce the penalty prescribed for a failure to perform such duty.

We have given the question raised in this case mature consideration, as we regard it as of the gravest nature, involving, as it does, the question of the dominion of the state over corporations which it has created.

The demurrer of defendants must be overruled; rule on defendants to plead in ten days.

• (Circuit Court of Cook County. In Chancery.)

Minnie C. Jensen

vs.

Paul C. Jensen.

(April 25, 1899.)

1. **ATTORNEYS—CONDUCT OF.** The practice of attorneys soliciting cases on contingent fees condemned.
2. **DIVORCE—SETTING ASIDE DECREE OF—PROCURING ABSENCE OF DEFENDANT.** Where a party obtains a decree or judgment in the absence of the opposite party, who has been led to believe that his case was not to be heard at the particular time, the court will set such judgment or decree aside where the case was heard in such party's absence.
3. **DECREE OF DIVORCE—SETTING ASIDE WHERE DEFENDANT GUILTY OF ADULTERY.** Where a decree of divorce has been awarded, the court will not set the same aside on the petition of the defendant, where such defendant has been guilty of adultery, as, if a new trial were ordered, the decree would be the same.
4. **SAME—WHEN SET ASIDE—MUST SHOW GROUND OF DEFENSE.** A court will not set aside a decree of divorce on the petition of the defendant unless a reasonable ground of defense is shown.
5. **SAME—ADULTERY OF DEFENDANT.** Where a defendant who is seeking to set aside a decree of divorce is charged with adultery, the court should give such defendant an opportunity to be heard where there is a reasonable doubt about the matter.
6. **ALIMONY—HOW AFFECTED BY ADULTERY.** Where a defendant seeking to set aside a divorce decree is charged with adultery and the illicit relation is apparently continued, the court will not allow alimony.

Bill of review to set aside decree of divorce. Gen. No. 185,836. Heard before Judge Murray F. Tuley.

For statement of facts see opinion.

F. A. Willoughby, F. S. Murphy and John W. Bantz, for complainant.

John A. Murphy, Jr. and Meek, Meek, Cochran & Munsell, for defendant.

TULEY, J. :—

I was in hopes that I was through with this case. As Justice O'Malley used to observe, "it is the worst case that ever came up them stairs" without any exception.

Suit was commenced in this court by Dr. Paul C. Jensen to secure a divorce from his wife, Minnie, on the ground of adultery. After occupying the attention of the court a number of days with application for temporary alimony, the case was got to an issue and was put upon the regular trial docket. It was reached in due course of business. When reached, the defendant was not present nor was her solicitor. The evidence was *ex parte* and a decree rendered. The defendant, some time afterwards, commenced a proceeding for a bill of review of this decree; publication notice, I believe, was obtained upon the doctor, and Judge Smith entered a decree by default setting aside the divorce decree. Answer was filed under the provisions of the statute allowing an answer to be filed where there is no personal service and the issues as made up are now brought before me for hearing.

This case is a very singular one in many respects. I will not attempt to analyze the evidence, it is not necessary; sufficient to say, that the evidence shows that the husband here is a very weak man; in fact these contracts that were read in evidence, by one of which it appears that three days after his marriage a man by the name of St. John, whom the husband regarded as a former lover of his wife, and so testified in substance, appears at their home, the home of the husband and wife in this city, and a contract the like of which never was seen in a court of justice was drawn up and entered into by which St. John and the husband agreed to support this woman by her maiden name, to contribute \$10 a week towards her support, each pledging himself to keep away from the woman, and if either one failed to make good her support, I believe the substance of the contract is, failing to pay his \$10, why, the other was to have free lance in regard to this woman. A husband who could enter into such a contract and also into the contract afterwards apparently made between him and his wife, by which he agreed to surrender about all that he was worth upon her obtaining a collusive divorce from him, shows that he is a very weak man with not enough manhood in him to obtain the respect of any woman. The wife is either a very designing woman, an adventuress,

making mankind generally her victims, or else she is the opposite thereof, an honest woman, seeking to make her living, the victim of poverty and adverse circumstances; a prey to designing men, who are always ready to profit by and despoil such women of their means and of their character. Now, which she is I do not know. To believe the evidence adduced on the part of the husband, she is an adventuress and nothing else; if you believe the evidence adduced by her, she is at least entitled to have that question tried, and if her evidence is true, she is more the victim of poverty and adverse surroundings and unprincipled men than an adventuress.

The case has been a development to me, a development of professional life. I recollect once to have seen a play called "High Life Below Stairs." I think that so far as the legal profession is concerned, this case is a case of professional life below stairs. It leads to arrests and counter-arrests on the part of the solicitors, charges of fraud, unprofessional conduct on both sides are alleged, and it develops a state of professional life that hitherto, I am happy to say, I have been almost unacquainted with.

Now, this bill is founded upon two allegations; first, that there was fraud used in obtaining the original decree of divorce, and that fraud, in substance, is alleged to consist in this, that her solicitor had in his employ, or in his office, a clerk, or a person, whom he trusted with the duty of keeping the watch of cases and notifying him as cases were reached and particularly with reference to this case, as it appears that the clerk was interested in the fees, he, according to his own testimony, having been one of those men that run around and hunt up divorce cases and accident cases for attorneys and share in the profits that the attorney may get out of the case; certainly a practice, if not disreputable, not to be commended to professional gentlemen.

That this party in his office had colluded with the attorney for the husband in this divorce case and had purposely kept her solicitor in ignorance of the time of trial. The evidence does not show collusion, so far as Mr. Murphy is concerned, but it does show bad faith on the part of this clerk; it shows

treachery on his part, and it shows conclusively to my mind, that by reason of his conduct, as shown by the evidence, the solicitor for this woman was not present in this court, nor was she present.

According to the testimony of her solicitor he never knew of this decree until after the term had expired at which the decree was entered, the decree being entered on the 8th of May and the term ending on the 23rd; that it was then too late to apply to this court for a rehearing, the term having expired.

The evidence satisfies me that this clerk knew of it; according to his own statement he knew of it within one or two days after the decree was entered. He did not inform, I believe, his employer, the solicitor of the defendant, of the entry of the decree until after the 23rd of May.

The obtaining of a default or of a decree or judgment by the non-appearance of the opposite party is one of the strongest cases of fraud found in the books as a ground for setting aside a judgment, if by contrivance, colluding or scheming, the opposite party is led to believe that his case is not to be heard when it is heard in his absence, and it affords good grounds for setting aside the advantage which the party obtains by the use of such scheming or fraud.

But, if this party were guilty of adultery, there would be little use in the court setting aside a decree and ordering a new trial in a case where it must result in the same decree.

Now, in order to obtain her relief against a decree thus obtained, she must show that a reasonable ground of defense—not that she is absolutely innocent, but that she has a reasonable ground for defense, a probable cause, and the court, in a proceeding of this kind, ought not to adjudicate whether she is guilty or not, but that she had such a case as entitled her to be heard and which might possibly result in a contrary decree or judgment to that which was obtained.

The evidence produced on the part of the husband which was *ex parte*, was sufficient to justify the entering of the original decree, but the main circumstances relied upon in that and which influenced the court in ordering that decree, was the circumstance testified to have taken place sometime in

November, about the 9th, of the husband going to the flat occupied by his wife with two men and finding this party, St. John, in bed at the hour of eleven or twelve o'clock at night in the wife's bedroom, which was positively sworn to. Mrs. Jensen and St. John, upon their oaths, have denied that any such thing ever occurred. These witnesses are not even here to reaffirm their own testimony in that regard, and give an opportunity to let the calcium light of cross examination in upon their evidence. They are not produced here in court. I think that that question as to whether that event ever took place and which really formed the ground for the original judgment or decree, ought to be left to a jury and I think I will take the responsibility, as this case will be reopened, of having a jury inquire into that fact. I have always found that a jury that is drawn from the body of the people at large, some from high life and some from low life, from all strata of society, are really more competent to judge of questions of credibility and especially of questions of fact of the nature which have been developed in this case, than even a judge on the bench, no matter how much experience he may have had. I think she is entitled to a hearing before a jury of her countrymen.

Of course, it is a serious thing to convict a woman of adultery unheard, and where there is a reasonable doubt of the matter, I think the court ought to give her an opportunity to be heard, and particularly where there is very strong evidence going to show that by the treachery of an employe of her attorney this default was occasioned at the original hearing.

I have been troubled a good deal upon the question of alimony in this case. Mrs. Jensen is not only charged with adultery with St. John, of which she knew when this original bill was filed, but she has continually since that time, even up to the present day, given grave ground of suspicions by her conduct that that charge of adultery is true. She swears it is not true; he swears it is not true. The jury will determine, but I will allow no alimony to a woman whose husband is seeking a divorce from her on the ground of adultery, who continues,

apparently, the illicit relation, or relations giving rise to grave suspicions that that charge of adultery is true.

There will be no alimony in this case from this on. Let the decree be prepared in accordance with the views expressed.

(Criminal Court of Cook County.)

The People of the State of Illinois

VS.

**William J. Davis, Thomas J. Noonan and James E.
Cummings.**

(September 30 and October 4, 1904.)

1. **CHANGE OF VENUE FROM COUNTY IN CRIMINAL CASES—TIME OF APPLICATION.** Where a petition for a change of venue from the county alleges that there is such a prejudice on the part of the people against the petitioner that he cannot have a fair and impartial trial, and that he did not become aware of such prejudice until September 27, 1904, at some time after 4 p. m., and notice of the application for a change of venue was served at 9:30 a. m. on the following day, it was *held* that the application was made in apt time.
2. **CHANGE OF VENUE—CRIMINAL CASES.** Where^a a defendant in a criminal case cannot have a fair trial in the county where he resides or where the offense is committed he is entitled to a change of venue.
3. **SAME.** Nor is such right affected by the fact that such change of venue would greatly increase the expense of trial to the state.
4. **SAME—DUTY OF STATE.** If the state's attorney on an application for a change of venue believes that no prejudice in fact exists it is his duty to contest the application. If, on the other hand, he believes that a prejudice does exist he should consent to the making of the change and not charge the court with the responsibility of doing so.

Indictment for manslaughter. Petition for change of venue on the ground of local prejudice. Heard before Judge George Kersten.

Statement of facts.

The defendants were indicted for manslaughter. The defendants Noonan and Cummings filed their respective petitions for a change of venue from Cook county on the ground of the prejudice of the inhabitants. The petition of the defendant Cummings is in the following form:

To the Honorable George Kersten, Judge of the Criminal Court of Cook County:

Your petitioner, James E. Cummings, defendant in the above entitled cause, respectfully presents this, his petition, for a change of venue from said Cook county, because of the prejudice of the inhabitants thereof, and represents unto this court and states the following:

1. That this petitioner now resides, and for more than fifteen years continuously last past has resided in the city of Chicago, county and state aforesaid; that he has been connected in different capacities with various theatres in said Cook county for a great many years last past.

2. That on February 23, 1904, your petitioner was indicted for manslaughter in said above entitled cause conjointly with said defendants Davis and Noonan; and your petitioner refers to said indictment, as aforesaid, and makes said indictment a part hereof; that as appears upon the back of said indictment, one hundred and thirty-eight witnesses were called before said grand jury and gave their said evidence, and, as your petitioner is informed and believes and therefore states the fact to be, said indictment was returned upon the evidence of said one hundred and thirty-eight witnesses, and that most if not all of said witnesses were then and there and now are inhabitants of said Cook county.

3. That, as will more fully appear from said indictment, your petitioner is charged therein with the offense of manslaughter, alleged therein to have been committed in said Cook county on December 30, A. D. 1903, by your petitioner with said defendants Davis and Noonan by reason of the death of the person named in said indictment, and that said crime is alleged in said indictment to have been committed by your petitioner and said defendants on said date last aforesaid, by

reason of the negligence of your petitioner and said defendants in not providing certain appliances and apparatus, alleged in said indictment to be required by the laws and ordinances of said city of Chicago for the safety of persons then and there on said December 30, A. D. 1903, assembled in a theatre then and there alleged in said indictment to have been located in said city of Chicago, and known as the Iroquois Theatre.

4. That it is alleged in said indictment that your petitioner on said December 30, A. D. 1903, and before then, was engaged in the business of stage carpentering of the building in which said Iroquois Theatre was located and of said Iroquois Theatre in said city of Chicago.

5. That it is further alleged in said indictment that a large number of persons were then and there assembled in said building and in said Iroquois Theatre to witness said theatrical performance, to-wit, "Mr. Bluebeard, Jr.," and that at the time of said performance a certain arc lamp was then and there without due caution and circumspection placed near a certain drapery situated on, in and about the stage of said Iroquois Theatre, and that said drapery was then and there ignited and set on fire by said arc lamp; and it is further alleged in said indictment that by reason of the fact that said defendants, as alleged in said indictment, had not complied with said ordinances, said fire was not then and there extinguished and not then and there confined to said stage, and a large amount of fire and smoke then and there poured and went forth from said stage to, towards, against and upon a large number of persons then and there assembled in said building and in said Iroquois Theatre, and against and upon said deceased then and there in said building, and in said Iroquois Theatre, and that by reason of said large amount of fire, smoke, heat, gas and flame, said deceased was then and there asphyxiated, strangled and died.

6. That it is true that on said December 30, A. D. 1903, a fire occurred on the stage of said Iroquois Theatre; that at said time of said fire, a performance of said "Mr. Bluebeard, Jr.," was being produced at said theatre, and that at said time "

large number of persons, consisting of men, women and children, were in said theatre witnessing said performance; that immediately after said fire, it was publicly announced through the papers, and otherwise, throughout said Cook county and throughout the United States, that said fire was a great calamity and that about six hundred lives had been lost by reason of the occurrences at or about the time of said fire in and about said theatre; and that, included among said list of persons, who had lost their lives as aforesaid, was the name of said deceased, mentioned in said indictment.

7. That after said fire, and on, to-wit, January 7, A. D. 1904, one John E. Traeger, then and there the coroner of said Cook county, held a coroner's inquest upon the body of said deceased mentioned in said indictment, and upon about six hundred other bodies then and there stated to have met their death in the way mentioned in said indictment; that said coroner's inquest was held in the council chamber of the common council of the city of Chicago; which said council chamber was then and there a large auditorium with many rows of seats and benches, and in which said council chamber there was a gallery; that the public were admitted to said inquest, and as your petitioner is informed and believes and so states the fact to be, many thousands of persons, inhabitants of said Cook county, attended said inquest and heard the testimony there given; that upon said inquest, as stated by said coroner, between two and three hundred witnesses were subpoenaed to testify, and more than one hundred and seventy witnesses were actually called by said coroner and did then and there testify before the coroner's jury; that said inquest covered a period of, to-wit, twenty days, and that the testimony so taken was published *verbatim* or in substance, in all the daily newspapers published in said county.

8. That said Iroquois Theatre, on December 30, 1903, was a new structure, located at 79 and 81 Randolph street, in said city of Chicago, of beautiful design, and opened to the public for the first time on, to-wit, November 23, A. D. 1903, and prior to such opening was extensively advertised as a new theatre about to be opened, and the residents and inhabitants

of said Cook county were generally aware, as was then and there publicly stated and announced throughout said Cook county by the press, of the opening of said theatre, and the opening of said theatre was a matter of public interest to the inhabitants of said Cook county.

9. That on said December 30, A. D. 1903, and for many months prior thereto and continuously thereafter up to and including the present time, there were and now are duly published in the English language throughout said Cook county, each day, certain newspapers which had the respective circulations among the inhabitants of said Cook county and were respectively read by the number of inhabitants of said Cook county, as follows, to-wit:

Name of Paper.	Circulation.	No. of Readers.
Chicago Daily News.....	300,000	600,000
Chicago Record Herald.....	150,000	300,000
Chicago Tribune.....	150,000	300,000
Chicago Inter-Ocean.....	60,000	120,000
Chicago Chronicle.....	50,000	100,000
American	200,000	400,000
Examiner	120,000	240,000
Chicago Evening Post.....	16,000	32,000
Chicago Evening Journal.....	100,000	200,000

10. That immediately after said fire, the mayor of the city of Chicago issued a public proclamation, with reference thereto, deploring the calamity of said fire and directing that a day should be set apart for mourning for the dead hereinbefore referred to, and that business throughout said city should be suspended; that such proclamation was recognized and concurred in by the inhabitants of said Cook county, and immediately thereafter all business in said city of Chicago, in said Cook county, was suspended and such proclamation was generally recognized and observed; and the people of said city of Chicago immediately entered into a state of mourning; and said fire and the death of the great number of people alleged to have been occasioned by said fire was the paramount and all-absorbing topic of conversation by the inhabitants of said

Cook county; and the public press of said Cook county devoted many editions of their respective newspapers to publishing the alleged details of said fire for many days, weeks and months thereafter; and it was publicly iterated and reiterated in said public press that said fire was occasioned and the great loss of life alleged to have been attendant thereon was alleged to have been occasioned by the negligence of your petitioner and other parties alleged to have been connected with the management and ownership of said building and said Iroquois Theatre.

11. That immediately after said fire the hospitals and morgues in said Cook county, as was alleged in the public press of said Cook county and believed by the inhabitants of said Cook county, were filled with the dying and dead alleged to have come from said theatre building and said theatre, and many tens of thousands of people congregated for days after said fire at said morgues and hospitals, and many other thousands of people congregated at the newspaper offices in said Cook county and at the police and fire headquarters in said Cook county, and the inhabitants of said Cook county were wrought up to a high pitch of excitement, lasting many days, weeks and months after said December 30, A. D. 1903, and a great and popular prejudice was then created in the minds of the inhabitants of said Cook county against your petitioner and against other persons connected with the said Iroquois Theatre and said building wherein said theatre was located, and that public sentiment became so great and strong that the mayor, the building commissioner and the fire marshal of said city of Chicago, together with others, were held to the grand jury of said Cook county by said coroner's jury, and that thereafter, and on said February 23, A. D. 1904, said building commissioner and one of his chief assistants were indicted by the grand jury of said Cook county for alleged culpable negligence in their conduct in connection with said building.

12. That a great number of civil suits have been instituted and are now pending against the Iroquois Theatre Company and persons connected therewith, and against several public officials charged with negligence causing said fire, and the in-

stitution of said suits has been greatly discussed and heralded throughout said Cook county as a matter of public interest.

13. That immediately after said fire, there was formed in said city of Chicago an association or corporation, publicly known and designated as the "Iroquois Memorial Association;" that said association has been continuously publishing and circulating great quantities of literature, in which they have directed the attention of the inhabitants of said Cook county to your petitioner and to the other persons alleged to have been connected with said theatre and said building as aforesaid, and in which they have charged your petitioner and said other persons with gross negligence, carelessness and wilful intentions, and in which said literature they have claimed that your petitioner and others were guilty of occasioning the great loss of life alleged to have resulted by reason of said fire as aforesaid; that ministers from their pulpits in said county have publicly denounced the persons alleged to have been connected with the management of said theatre and said building as aforesaid, including your petitioner; that school teachers throughout said Cook county have frequently since said fire formed societies in and among the children attending their respective schools, for the purpose of constantly creating, and such associations do constantly create, a prejudice in the minds of said children and in the minds of the parents of said children, inhabitants of said Cook county as aforesaid, against persons alleged to have been connected with the management of said theatre and said building as aforesaid, including your petitioner; that your petitioner, together with the persons alleged to have been connected with the management of said theatre and theatre building, have frequently been referred to, in the public press of said Cook county, as murderers and felons, and said public press of said Cook county has frequently demanded that your petitioner be punished for the alleged death of said persons as aforesaid; that said public press has frequently referred to the fact of the alleged violations of the city ordinances of said city of Chicago, pretendedly set forth in said indictment, and has directed the attention of the inhabitants of said Cook county

to such alleged violations, and have stated, on their own responsibility, that such violations existed, and that such violations were criminal, and that said theatre was not constructed, maintained or operated according to the ordinances of said city of Chicago.

14. That on said December 30, A. D. 1903, there were from twenty-five or thirty operating theatres in said city of Chicago, and that immediately after said fire, as aforesaid, and on, to-wit, January 1, 1904, Honorable Carter H. Harrison, then and there the mayor of said city of Chicago, ordered each and every one of said theatres to shut down and remain closed, and said theatres did for a long time thereafter shut down and remain closed; that prior to said December 30, A. D. 1903, more than twenty thousand persons were in the habit of visiting said theatres daily, and that more than, to-wit, ninety per cent. of said people so visiting said theatres were and now are inhabitants of said Cook county; and that the mayor of said city of Chicago, in ordering said theatres to close and in closing said theatres as aforesaid, publicly announced, and such announcement was circulated throughout said Cook county in the public press, that said theatres were closed and shut down for the reason that said theatres were violating the ordinances of said city of Chicago, and said mayor and other officials of said city of Chicago then and there directed the attention of the inhabitants of said Cook county to the alleged violations of said ordinances by the said persons alleged to be connected with the management of said Iroquois Theatre and said building as aforesaid; that by reason of such facts, the attention of many hundreds of thousands of inhabitants of said Cook county was directed to the alleged violations of the ordinances of said city of Chicago set forth in said indictment.

15. Your petitioner particularly refers to and herewith brings into court several editions of said newspapers hereinbefore referred to which were printed, published and circulated throughout said Cook county, between the dates of December 30, A. D. 1903, and January 29, A. D. 1904, both inclusive, and particularly refers to each and every part of said

newspaper and makes such parts of said newspapers a part of this, his said petition, for a change of venue with the same force and effect as if your petitioner had set forth said parts of said newspapers in this, his said petition, referring to said Iroquois fire and your petitioner and the alleged owners, managers and operators of said theatre and said theatre building, and to such parts of said newspapers referring to any of the facts hereinbefore stated.

16. That said prejudice had apparently died out at the time of the indictment on February 23, A. D. 1904, and until September 19, A. D. 1904, and upon said latter date said Iroquois Theatre was again opened for amusements, whereupon the public protests against the opening of said Iroquois Theatre by the press of said Cook county and by ministers, school teachers, school children and by others, recalled the horrors of said fire and aroused the passion and revived the prejudice of the inhabitants of said Cook county against those connected with said theatre, including the petitioner.

That the reopening of the Iroquois Theatre and the agitation attendant thereon were given wide publicity throughout said Cook county; that immediately upon said reopening and thereafter up to and including the present time, the occurrence of said fire and the great loss of life attendant thereon, and the surrounding facts and circumstances have been again agitated and republished, and brought again to the attention and knowledge of the inhabitants of said Cook county, and in addition thereto the state's attorney of said Cook county at certain public gatherings, including relatives of those whose lives were so lost, has been charged with dereliction in not convicting said defendants herein, and that a great prejudice against said defendants has again been occasioned and is now in the minds of the inhabitants of said Cook county.

17. That your petitioner particularly refers to and herewith brings into court several editions of said newspapers hereinbefore referred to, which were printed, published and circulated throughout said Cook county on September 20, A. D. 1904, the day after the re-opening of said Iroquois Theatre and building as aforesaid, and the edition of the Chi-

cago Inter-Ocean of Sunday, September 25, A. D. 1904, and particularly refers to each and every part of said newspapers and makes said parts of said newspapers a part of this your petitioner's said petition for a change of venue, with the same force and effect as if your petitioner had set forth such parts of said newspapers in said petition referring to the Iroquois fire and to the prosecution of your petitioner and the other defendants herein and the re-opening of said Iroquois Theatre as aforesaid.

18. Your petitioner further states that this petition is made at the first opportunity since the knowledge of the existing prejudice of said inhabitants of said Cook county came to this petitioner, and that knowledge of the existence of said prejudice first came to this petitioner on the 27th day of September, A. D. 1904; that at the time petitioner was indicted as aforesaid, said publications in said newspapers practically ceased and public excitement was apparently over, and that after petitioner was indicted he believed that without any renewed agitation of the matters and things herein set forth in connection with said fire he could, without prejudice to his rights to obtain a fair and impartial trial, submit to a trial in said Cook county; that although said defendants were indicted on said February 23, A. D. 1904, the state's attorney of said county did not as against petitioner move to place said case on trial until September 26, A. D. 1904, and this petitioner or his counsel had no notice whatever of said move or that said case was to be called for trial, until September 26, A. D. 1904; that thereupon petitioner, by himself, numerous friends and associates at once instituted extensive inquiries among the inhabitants and citizens of said Cook county for the purpose of ascertaining whether such a prejudice now exists against said petitioner among said inhabitants of said Cook county as to prevent petitioner from obtaining a fair and impartial trial in said Cook county, and your petitioner further avers as the result of such inquiries as aforesaid he, for the first time since the indictment herein believed on September 27, A. D. 1904, that such a prejudice exists against him among said inhabitants of said Cook county that he can-

not in said county obtain a fair and impartial trial, and that knowledge of such prejudice first came to petitioner on said September 27, A. D. 1904.

Wherefore, the premises considered, your petitioner prays for a change of venue from the criminal court of said Cook county.

And your petitioner will ever pray.

JAMES E. CUMMINGS.

State of Illinois, }
County of Cook. } ss.

James E. Cummings, being first duly sworn, upon oath deposes and says that he has read the above and foregoing petition by him subscribed, and knows the contents thereof, and that the contents of said petition, and the allegations and facts therein stated, are true in substance and in fact.

JAMES E. CUMMINGS.

Subscribed and sworn to before me, a notary public of Cook county, Ill., on this 28th day of September, A. D. 1904.

[Seal.]

EUGENE A. MORAN,

Notary Public, Cook County, Illinois.

A similar petition was filed by Thomas J. Noonan.

Many thousands of affidavits were filed to show the existence of prejudice. No counter affidavits were filed by the state. The state finally conceded that prejudice did in fact exist and withdrew its objection to the granting of the change of venue. The affidavits were in the following form:

———, being first duly sworn, upon oath deposes and says that he now is and for more than a year last past has been a resident, inhabitant and citizen of said Cook county, in said state of Illinois, and that he now resides at ——— in the city of Chicago, in the county and state aforesaid, and that his occupation is that of ———.

That he is not of kin or counsel to any or either of the defendants herein; that said defendants herein were indicted in the criminal court of said Cook county on February 23, A. D. 1904, for manslaughter alleged in said indictment to have been occasioned by a fire which occurred on December 30,

A. D. 1903, at a place in said city of Chicago known and designated as the Iroquois Theatre.

That immediately after said fire it was universally reported and the inhabitants of said Cook county believed that a great number, to-wit, more than six hundred lives were lost at said fire; that by reason of said great numbers of deaths and the statements contained in the public press which were circulated in said Cook county, and by reason of the indictment herein, and of the indictment of divers public officials of said city of Chicago because of the facts and circumstances arising out of said fire, and by reason of the closing of all the theatres in the said city of Chicago, on, to-wit, January 2, A. D. 1904, and the same being kept closed for several months by order of the mayor of said city and by reason of statements made by members of certain memorial associations, which statements were printed, published and circulated throughout said Cook county, a very great and popular prejudice arose in the minds of the inhabitants of said Cook county against the defendants herein and against other persons connected with said Iroquois Theatre and against said theatre, and that by reason of all such facts a great popular prejudice and clamor arose in the minds of the inhabitants of said Cook county against said defendants herein.

The said prejudice had apparently died out at the time of the indictment on February 23, A. D. 1904, and until September 19, A. D. 1904, and upon said latter date said Iroquois Theatre was again opened for amusements, whereupon the public protests against the opening of said Iroquois Theatre by the press of said Cook county and by ministers, school teachers, school children and by others, recalled the horrors of said fire and aroused the passion and revived the prejudice of the inhabitants of said Cook county against those connected with said theatre including the defendants herein.

That the reopening of the Iroquois Theatre and the agitation attendant thereon were give wide publicity throughout said Cook county; that immediately upon said reopening and thereafter up to and including the present time, the occurrence of said fire and the great loss of life attendant thereon,

and the surrounding facts and circumstances have been again agitated and republished, and brought again to the attention and knowledge of the inhabitants of said Cook county, and in addition thereto the state's attorney of said Cook county at certain public gatherings, including relatives of those whose lives were so lost, has been charged with dereliction in not convicting said defendants herein, and that a great prejudice against said defendants has again been occasioned and is now in the minds of the inhabitants of said Cook county, and this affiant believes and says that said defendants, Noonan and Cummings, will not and cannot receive a fair and impartial trial in the criminal court of said Cook county in which the case herein is pending, because the inhabitants of said Cook county are prejudiced against said Noonan and Cummings and each of them.

And further affiant saith not.

The motion for a change of venue was thereupon granted and the case was transferred to Peoria county. The court rendered two opinions: one on September 30, 1904, and the other on October 4, 1904.

Charles S. Deneen, state's attorney, *A. C. Barnes* and *E. C. Lindley*, assistant state's attorneys for the people.

Levy Mayer, *Alfred S. Austrian*, *Moritz Rosenthal*, *W. J. Hynes*, *E. C. Higgins* and *Howard O. Sprogle*, for the defendants.

Opinion rendered September 30th, A. D. 1904.

KERSTEN, J.:—

This is a motion on the part of the state to deny the petition for a change of venue on the ground that it is not made in apt time. That is the sole question under consideration, and not the question, shall a change of venue be granted even at this time? Much of the argument has been unnecessarily addressed to the latter proposition. The question is, was the petition presented or filed in apt time? The state has denied that the application for change of venue was made at the earliest opportunity, and that the state's attorney's office did

not receive the requisite legal notice, and that therefore the petition should be denied.

The state has abandoned the latter proposition, thus leaving the first open to be passed upon.

The petition recites that there exists at the present time such a prejudice on the part of the people of this county against the petitioner that he fears that he cannot have a fair and impartial trial in this county and that he did not become aware of said prejudices of the people of said county against him until September 27th, 1904, at some time after four p. m. It has been shown that notice was served on the state's attorney about 9:30 a. m. on the next day, that the petitioner was about to apply for a change of venue.

If it is true that the petitioner had no knowledge of the existing prejudice against him on the part of the people of this county until the 27th of September, 1904, at four p. m., the latter having served notice at 9:30 a. m. on the next day upon the state's attorney of his intention to pray for a change of venue, then he has fulfilled, I think, the requirements of the statute.

The court has no other legal evidence upon this proposition than that which is disclosed by the petition itself. The petition technically fulfills the requirements of the law and shows *prima facie* that there exists such a prejudice on the part of the people of this county against the petitioner that he cannot receive a fair and impartial trial in this county and that he did not become aware of this prejudice until the evening of September 27th, 1904. It is also shown that on the next morning at about 9:30 o'clock he served notice on the state's attorney of his intention to pray for a change of venue.

The facts stand uncontradicted, and therefore must be accepted as true.

The motion to dismiss the petition is denied.

Opinion rendered October 4, 1904:

KERSTEN, J.:—

Before granting this change of venue, I desire to say this: This is a very important matter, much more important than any matter that has arisen in this court for a long time. Un-

der the law, if a defendant cannot have a fair trial in the county where he resides or where the offense was committed, he is entitled to a change of venue. There is no question in regard to that. When these defendants filed their petition asking for a change of venue it was contested by the state, it was bitterly contested, I might say up to this morning. Suddenly the state ceases to contest this application for a change of venue, first on the ground of expense, secondly on the ground that the state did not know just what number of affidavits the defendants would bring forward.

Now, so far as the expense is concerned, the matter is so important that no expense should prohibit the state in any way, shape or manner from contesting this petition for a change of venue if the state is of the opinion that there is not such prejudice which would justify this court in granting a change of venue.

MR. BARNES: And if it can get the money to do so.

THE COURT: The money should be there.

MR. BARNES: But it is not.

THE COURT: That is absolutely no excuse.

MR. BARNES: Well, it is not there.

THE COURT: I will say to the state that the reason I make these remarks is that I am being put in a false position in granting this change of venue, if I do grant it, which of course, the petition not being contested, I am compelled to do. There has been some newspaper talk, I do not know whether it came from the state's attorney's office or not, which in a manner brought the burden of granting this change of venue upon this court. Now, I wish to say that I am acting in this matter as I will in every matter that comes before me, strictly in accordance with the law, and I want to do justice in this case, as I will in every case, as I see it. If I am mistaken about any proposition, that is a different question. But as I said before, if the state is of the opinion that there is no prejudice existing in this county it is the duty of the state to contest this petition, it was the duty of the state to file counter affidavits, and not say, "well, the court has ruled against us on the preliminary petition, and if you have all these affidavits we won't contest it because the court will prob-

ably grant the change of venue anyway." In doing that the office of the state's attorney is not acting in good faith.

MR. BARNES: Has the state's attorney said that?

THE COURT: Not in so many words. * * *

THE COURT: I don't care to say anything more on that subject. It is sufficient to say that already cranks have commenced to write letters, one of which I received this morning, which was threatening in the extreme, and stated that if I granted a change of venue in this case I might look for a vigilance committee or something of that kind. Not only could things of that kind be averted, if the state's attorney would come right out and say there is no prejudice in this county and we will contest the change, or say, "well, gentlemen, it seems to me that there is prejudice in this county and we will not contest it." That would be the manly way of treating a matter of this kind.

MR. LINDLEY: It was not until after the affidavits were presented that we could have any conception of the prejudice which they say exists.

THE COURT: There is no rule of law compelling any living man to produce his testimony beforehand. This is an issue of fact that is tried in the same manner as any other issue, and no court would have the right to say to the plaintiff, "Mr. Plaintiff, I want to know what kind of evidence you have on which you base your claim; I want to know how many witnesses you have whom you intend to introduce; I want to know the nature of the evidence on which you will depend, any more than the court would have the right to ask the defendant similar questions. It is an issue of fact that this court and any other court would be bound to hear whatever evidence, proper legal evidence, either litigant would bring forth.

MR. LINDLEY: Wasn't it announced by the state's attorney most promptly, when the number of affidavits was stated, that he believed too that the change should be granted?

MR. MAYER: The state's attorney in his argument stated to the court that every county in the state was prejudiced, and I advanced that as one of the reasons why a change of venue should be granted.

(Criminal Court of Cook County.)

The People of the State of Illinois

vs.

William J. Davis.

(June 14, 1906.)

1. **CHANGE OF VENUE—LOCAL PREJUDICE.** A change of venue will seldom be granted from a large city where many men are eligible for jury service; but where the defense presents over 12,000 affidavits as to the existence of prejudice, and the state about 4,000 counter affidavits, the change of venue must be granted.
2. **SAME—APPLICATION FOR—MERE NUMBER OF AFFIDAVITS.** Mere numbers alone of affidavits that the defendant cannot receive a fair trial in the county do not govern the granting of the change of venue, but the character and reputation of the persons making the affidavits will be considered.
3. **SAME—CHARACTER AND NUMBER OF AFFIDAVITS.** Where vast numbers of affidavits of prejudice are presented, among which are those of large numbers of prominent men, the court will grant the change of venue, and such a record is conclusive upon the court that prejudice still exists although the catastrophe for which the defendant was indicted occurred a year or more previous.

Indictment for manslaughter. Motion for change of venue from Cook county, Illinois, on the ground of local prejudice. P. G. D. No. 76,382. Heard before Judge Ben. M. Smith.

Statement of facts.

William J. Davis, as manager of the Iroquois Theatre, was indicted on February 25, 1904, for manslaughter as the result of a fire in the Iroquois Theatre building, in the city of Chicago, on December 30, 1903, by which several hundred persons lost their lives, due, it was alleged, to the failure of the owners and managers of the theatre building to comply with the building ordinances of the city of Chicago, etc. This indictment was quashed by Judge Kersten of the criminal court of Cook county on February 9, 1905. Subsequently on March 4, 1905, a second indictment was returned against Will. J. Davis, charging him with manslaughter as the result

of the same fire. A petition for a change of venue from Cook county on account of the prejudice of the inhabitants was filed on March 10, 1905, and a motion to quash the second indictment was filed. The motion to quash was heard in June, 1905, and on January 23, 1906, the motion to quash was denied as to certain of the counts and granted as to others. The motion for a change of venue was heard by the criminal court in June, 1906. The petition for a change of venue alleged that Will J. Davis had for many years been connected with the management of various theatres in the city of Chicago, and that he was by name and reputation well known to a large part of the inhabitants of the city of Chicago and Cook county; that the Iroquois Theatre in Chicago was on November 23, 1903, opened to the public for the first time after much advertisement and that said opening attracted great public attention; that on the afternoon of December 30, 1903, a fire occurred in the Iroquois Theatre during the course of the matinee performance, and as a result of this fire five hundred and ninety-seven men, women and children lost their lives; that after said fire the hospitals and morgues in Cook county were filled with the dead and dying alleged to have come from said theatre building, and that many tens of thousands of people congregated for days about the hospitals, etc., inquiring for persons supposed to have died or been injured in the fire, and that as a result the inhabitants of Cook county were wrought up to a high pitch of excitement; that immediately after the fire the mayor of Chicago issued a proclamation with reference to and directing that a day be set apart for mourning and asking that business be suspended, and that such proclamation was generally observed; that the fire and its consequences was then the paramount topic of conversation by the inhabitants of Cook county; that immediately after the fire on January 1, 1904, the mayor of Chicago ordered closed all the twenty-five to thirty theatres in the city of Chicago, for the reason that all of the theatres were violating the ordinances of the city of Chicago; that immediately after the fire there was formed an association designated as the "Iroquois Memorial Associ-

ation," which had been publishing a great amount of literature calling the attention of the inhabitants of Cook county to the petitioner, and charging the petitioner and other persons with gross negligence, carelessness and wilful intentions and claiming that the petitioner was guilty of causing the great loss of life by reason of the fire and that similar charges were made by ministers from their pulpits, and by school teachers to their pupils; that on January 7, 1904, the coroner of Cook county held a coroner's inquest over the victims of the fire; that the inquest was held in the city council chamber of Chicago, and that many thousands of inhabitants of Cook county attended said inquest and heard the testimony, and that between two and three hundred witnesses were called to testify at said inquest and that one hundred and seventy witnesses actually did testify; that the inquest covered a period of twenty days and the testimony was published *verbatim* or in substance in all the daily newspapers in Chicago; that the daily newspapers of Chicago had enormous circulation and reached amounting to almost one million five hundred thousand copies per day, and that immediately after the fire their newspapers devoted many editions to publishing accounts of occurrences at the fire, and alleged that the loss of life was occasioned by the negligence of the petitioner; that the newspapers alleged in great detail heart-rending occurrences at the fire and the various defects alleged to exist in the theatre building and its management and construction; that the newspapers published that the petitioner with others, including the fire inspector and building inspector and the mayor of the city of Chicago, were responsible for the hundreds of deaths from the fire; and published statements such as that "nearly all exits save the main doors were locked," etc., and that their statements were published and printed in large bold type and head-lines upon the first pages; and that large pictures were published showing horrible scenes at the fire; that lists of names of the injured and dead were published; that it was published that the laws and building ordinances of the city of Chicago were violated by the petitioner in the construction and operation of the theatre; that on De-

cember 31, 1903, certain employes of the theatre were placed under arrest, and that the news of the arrests was heralded and published in the newspapers; that all these things incited the public mind and prejudice against the petitioner; that a coroner's jury was summoned on January 1, 1904, to investigate into the catastrophe, and that its proceedings were published at length in the newspapers; that on January 2, 1904, the petitioner with others was arrested for manslaughter and great publicity was given to the arrest; that other arrests were made; that great numbers of damage suits were instituted against the petitioner and others arising out of the fire; that many pictures of the injured were published in the newspapers; that from January 8, 1904, almost continuously certain newspapers continued to publish statements charging the petitioner as the cause of the catastrophe; that on January 25, 1904, the coroner's jury held eight persons to the grand jury, including the petitioner, the mayor, building commissioner, and chief of the fire department of the city of Chicago, which was published at length in the newspapers; that on February 25, 1904, the petitioner was indicted together with others for manslaughter as the result of the fire; that all the time the newspapers printed articles derogatory to the petitioner, which incited in the minds of the inhabitants of Cook county great prejudice against the petitioner; that no steps were taken in the cases until September 28, 1904; that in the meantime the Iroquois Memorial Association circulated large numbers of articles and letters to the inhabitants of Cook county, asking for contributions of funds to assist in the prosecution of the petitioner; that in the meantime many articles and pictures were published in the papers tending to excite the public mind against the petitioner. That on October 4, 1904, a change of venue was granted to two co-defendants with petitioner; that on October 4, 1904, petitioner moved to quash the indictment against him and the motion to quash was argued on November 1 and 2, 1904; that on February 9, 1905, the indictment was quashed by Judge Kersten; that immediately after the quashing of the indictment a grand jury was impanelled on February 20, 1905, and on March 4, 1905, a

second indictment was returned charging the petitioner with manslaughter as the result of deaths due to the fire; that several hundred damage suits (in one day as many as sixty, asking damages amounting to \$500,000) were started against petitioner, and the institution of such suits was given great publicity by the press of the city of Chicago; that 600 persons lost their lives in the fire, of whom over 500 resided in Chicago, in Cook County. The petitioner added as exhibits to his petition files of the daily newspapers of Chicago covering the period since the fire, with all references thereto marked.

On June, 1906, a supplemental petition was filed by the petitioner referring to and making a part thereof all of the averments of the petition for a change of venue filed March 10, 1905, and further alleging that there had existed continually since December 30, 1903, and then existed a great prejudice against petitioner.

Upon the hearing of the motion the petitioner filed 12,150 affidavits signed by men in all walks of life and by large numbers of men prominent in their professions and business and well known reputation; such affidavits were in the following form:

———, of lawful age, being first duly sworn, upon oath deposes and says:

1. That he now is and for many years continuously last past (beginning at a period long before the Iroquois fire hereinafter referred to) has been a resident and citizen of the city of Chicago, in said county and state, and now resides at ——— in said city, and his occupation is that of ——— and his place of business is at ——— street in the said city.

2. That he is not of kin or counsel to the defendant herein.

3. That this affiant is well acquainted and familiar with the occurrence of the fire at the Iroquois Theatre, in said city, on December 30, 1903; and the subsequent developments growing out of such fire; that since said fire, up to and including the present time, this affiant has frequently discussed with and heard discussed, among many of the inhabitants of said county, the occurrences connected with and growing out

of said fire, including the facts and circumstances relating to the great loss of life in and by reason of said fire, the investigation of the causes of the loss of life by the coroner's jury in said county, the arrest of said defendant and other persons connected with said Iroquois Theatre, the hearing before and the binding over to said criminal court by the coroner of said county of said defendant herein and others, the closing following said fire, of the theatres in said city by order of the mayor thereof, the petition for a writ of *habeas corpus* by the mayor of said city, who on account of said fire had been bound over by said coroner to the grand jury of said county; the discharge of said mayor under said writ, the indictment of the building commissioner of said city and his assistant, and of the said defendant herein and one Thomas J. Noonan and one James E. Cummings, the quashing of said indictment against said Noonan, Cummings and said defendant and the re-indictment of said defendant, being the present indictment; and has read and seen in the Chicago daily papers, a great many articles, cartoons, and pictures, detailing and portraying the said fire and said loss of life, the progress of said investigations and prosecution, and the incidents connected therewith, and other facts and circumstances relating to said subject-matter, and to the Iroquois Memorial Association (composed of members of the families that suffered loss of life in said fire), and detailing also statements purporting to emanate from persons connected with said association, and reciting also the facts and circumstances connected with the re-opening of said theatre.

4. That this affiant has frequently up to the present time, talked with many persons, inhabitants of said county, regarding the various matters aforesaid and concerning the guilt or innocence of those alleged to have been in the management and control of said theatre, including said defendant, and that from said publications as aforesaid, and from said facts and circumstances hereinbefore detailed, and from said conversations, this affiant verily believes and states the fact to be that great prejudice against said defendant has been occasioned, and is now prevalent in the minds of the inhabitants

of said Cook county, and this affiant verily believes and states the fact to be that said defendant will not and cannot possibly receive a fair and impartial trial in the above entitled cause of *People v. Davis*, now pending in the criminal court of said Cook county, because the inhabitants of said Cook county are now prejudiced against him, said Davis.

And further affiant saith not.

—————
The state in opposition to the motion filed about 4,000 affidavits in the following form:

—————, being first duly sworn, upon oath deposes and says:

That he now is and for many years continuously last past has been a resident, inhabitant and citizen of the city of Chicago, in said county of Cook, in said state, and now resides at ——— in said city, and his occupation is that of ——— and his place of business is at ——— street in the said city.

That this affiant has knowledge of and is generally familiar with the occurrence of the fire at the Iroquois Theatre, in said city, on December 30, 1903; and the subsequent developments growing out of such fire; that since said fire, this affiant has frequently discussed with and heard discussed, among different inhabitants of said Cook county, occurrences connected with and growing out of said fire, including the facts and circumstances relating to the loss of about 600 lives in and from said fire, and the indictment of said defendant, William J. Davis, and has seen and read newspaper accounts of said fire.

That this affiant has very frequently talked with different inhabitants of said Cook county, regarding said fire and concerning the guilt or innocence of those alleged to have been in the management and control of said Iroquois Theatre at the time of said fire, including said defendant, and that from said publications as aforesaid, and from said facts and circumstances hereinbefore detailed, and from said talks had with said persons this affiant states that in his opinion there exists now no prejudice on the part of the inhabitants of Cook county, Illinois, against William J. Davis sufficient to

prevent him from receiving a fair and impartial trial in the above entitled cause of *People v. Davis*, now pending in the criminal court of said Cook county.

And further affiant saith not.

Moran, Mayer & Meyer for petitioner. (*Levy Mayer* and *Alfred S. Austrian*, of counsel.)

1. The petitioner is entitled to a fair and impartial trial. (a) By constitution and statutes. Sec. 9, art. 2, constitution of Illinois; secs. 18, 22, ch. 146, Revised Statutes of Illinois; *Clark v. People*, 1 Scam. 117, 120; *Riggen v. Commonwealth*, 3 Bush (66 Ky.) 494. (b) At common law. 4 Encl. Pl. & Pr. 397; *State v. Burris*, 4 Harr. (Del.) 582.

2. The right to a fair and impartial trial should not be affected by suggestions or arguments of inconvenience or delay. *Wormley v. Commonwealth*, 10 Gratt. (Va.) 658, 662; 4 Encl. Pl. & Pr. 397, note 4.

3. The right to a change of venue must be liberally interpreted. *Packwood v. State*, 24 Ore. 261, 33 Pac. 674; *Price v. State*, 8 Gill (Md.) 296, 302; *Gardner v. State*, 25 Md. 146, 152; 4 Encl. Pl. & Pr. 380, 381. And in case of a doubt it is best to resolve it in favor of the application for a change of venue. *State v. Gray*, 113 La. 671, 37 So. 597.

4. There are many strong illustrations where the evidence shows that there were reasonable grounds to believe that the defendant could not have a fair trial even though there were a large number of negative affidavits showing that he could have a fair trial. *Alarcon v. State* (Tex. Cr. App.), 83 S. W. 1115; *Scams v. State*, 84 Ala. 410, 4 So. 521; *Johnson v. Commonwealth*, 82 Ky. 116; *Posey v. State*, 73 Ala. 490, 494; *People v. Long Island R. Co.*, 4 Parker's Crim. Repts. 602; *Commonwealth v. Ronemus*, 205 Pa. 420, 54 Atl. 1095; *State v. Billings*, 77 Iowa, 417, 423, 47 N. W. 456. Notoriety of a case and aroused feelings of the people are to be considered. *Alarcon v. State* (Tex. Cr. App.), 83 S. W. 1115; *Richmond v. State*, 16 Neb. 388, 20 N. W. 282. The passions only slumber and may break out again at any moment. *Commonwealth v. Ronemus*, 205 Pa. 420, 54 Atl. 1095. "When a proper case

is presented, to refuse such a change of the place of trial would be mob law inside instead of outside the court house." *Garcia v. State*, 34 Fla. 311, 16 So. 223, 228.

5. Affidavits of leading citizens have great weight, and counter-affidavits which simply say that there is no prejudice that will prevent a fair and impartial trial and do not controvert the particular facts alleged in the affidavits for the change are of little avail. *Richmond v. State*, 16 Neb. 388, 20 N. W. 282; *Hickman v. People*, 137 Ill. 75; *State v. Billings*, 77 Iowa, 417, 423, 42 N. W. 456.

6. The overwhelming number of affidavits filed on behalf of the petitioner entitles him to the change of venue from Cook county. The petitioner files 12,150 affidavits for the change while the state files only about 4,000 counter-affidavits.

John J. Healy, state's attorney, and *Harry Olsen*, assistant state's attorney, for the people.

Mere numbers of affidavits should not control. *MacDonald v. People*, 49 Ill. App. 357.

SMITH, J.:—

The court has given this matter very careful consideration. The question now before the court seems to be whether or not such prejudice now exists in the minds of the inhabitants of this county that this defendant cannot get a fair and impartial trial in this county. And in the consideration of that question it is brought to the attention of the court that on a former indictment against this defendant for the same offense a change of venue was allowed to another county with, as I understand, no opposition; that it has been substantially conceded by the state, up to about a year ago, that there was such a prejudice that the defendant would be entitled to a change of venue. Therefore, about the only question that is left to the court is whether or not during the past year there has been a change so that at the present time any feeling of prejudice against this defendant has so abated that he could now safely go to trial in this county.

It would seem that there are very few occasions that in a great city like this a man would be entitled to a change of

venue. So far as we can look forward and anticipate cases it is very seldom that circumstances arise that would make a situation in a great cosmopolitan city where a man would not get a fair and impartial trial. But it does seem on the other hand that if there were a case, a case similar to this would entitle a man to a change of venue. In a horrible catastrophe such as this was, where some six hundred lives were lost, I undertake to say that there is hardly a neighborhood in the city of Chicago and Cook county but what has some victim of that terrible fire, and it would seem to the court that a jury from this county would be influenced more or less, many of them, by the fact that their neighbors or their friends were interested in the outcome of this suit. However that may be, the court is confronted with a record here that seems to the court to allow but one conclusion. The defense has presented over twelve thousand affidavits in this case as to the prejudice, and the state something like four thousand. Now, while we all concede that it is not a matter of numbers, because if it were numbers that govern that would simply mean a contest in many counties between opposing factions until you get a majority of the people of an entire county who would testify one way or the other, but in this case there are over twelve thousand affidavits presented to the court; among them are hundreds and thousands of men who stand high, foremost citizens of the state, intelligent, the peers of any, men high in their efforts to enforce law and order, and it is difficult for the court to say that these men, prominent, influential citizens of Chicago, who come into this court and under oath testify, for that is substantially what they do, that this defendant cannot receive a fair and impartial trial on account of the prejudice of the inhabitants of this county—they must be entitled to some credence. Such men as Judge Payne, Dr. Emil Hirsch, Dr. Frank Billings, and hundreds of others, men who ought to know, men who it would seem would know what the situation is in this county, the court will hardly assume that these men are testifying to something that they know nothing about, or wilfully testifying to something that is not true. And with the testimony of so many men of in-

fluence and standing, so high in the community, it leaves the court nothing else to do on this record but grant a change of venue. Men of that character and in such vast numbers, puts the court in a position that this community is in such condition and frame of mind that their testimony cannot be ignored by the court on the record that is made here, and the motion will therefore be allowed.

As to the county, counsel may confer upon that. The court will say this, however, that the court will not send it to any remote county in the state and not send it to any county except some county that can be easily reached from Chicago, that will be accessible and convenient. If counsel can agree upon such a county it will be perfectly satisfactory to the court, and if they cannot the court will determine.

(Criminal Court of Cook County.)

The People of the State of Illinois

vs.

**William J. Davis, Thomas J. Noonan and James E.
Cummings.¹**

(February 9, 1905.)

1. **MOTION TO QUASH AT COMMON LAW.** At common law a motion to quash an indictment was addressed to the sound discretion of the court. (KERSTEN, J.)
2. **RULE IN ILLINOIS.** But in Illinois error may be assigned upon the overruling of a motion to quash, and it is the duty of the court to quash if the indictment is insufficient to sustain a conviction. (KERSTEN, J.)
3. **STATUTES—RULE OF CONSTRUCTION.** As a general rule the courts will construe statutes as declaratory of the common law and not in derogation of it. And when words are used in a statute which have a well known meaning at common law, the courts will give such words their common law meaning. (KERSTEN, J.)

¹ See also *People v. Davis*, 1 Ill. C. C. 245, for a contrary decision on a second indictment for the same offense.—Ed.

4. **"UNLAWFUL ACT"—DEFINED.** The words "unlawful act," as used in the statute defining manslaughter, mean unlawful as defined by the common law, and include not only criminal acts, but trespasses and civil wrongs which are not prohibited by statute. (KERSTEN, J.)
5. **NEGLIGENCE—MANSLAUGHTER.** If a death occurs through the negligent use of dangerous agencies it is manslaughter. But the negligence to be "unlawful" must amount to an omission of a legal duty and not a mere neglect of a social or moral duty. (KERSTEN, J.)
6. **MANSLAUGHTER—PROXIMATE CAUSE.** The unlawful act or omission must have been the proximate cause of the death. (KERSTEN, J.)
7. **STATUTES—REVISION OF ENTIRE SUBJECT—REPEAL.** A statute which is an entire revision of a particular subject-matter repeals the common law upon that particular subject. (KERSTEN, J.)
8. **CRIMINAL CODE DOES NOT REPEAL COMMON LAW.** The criminal code was not intended as a complete codification of the criminal laws; the common law remains in force except in so far as it is expressly repealed. (KERSTEN, J.)
9. **FIRE ORDINANCES—UPON WHOM DUTY FALLS.** Where city ordinances prescribe that buildings of a certain class shall be equipped with fire apparatus, equipment, etc., but fail to designate the person upon whom the duty rests, it will be presumed that it was the intention of the city council to impose such duties upon the owner or lessee of the building. (KERSTEN, J.)
10. **ORDINANCES—JUDICIAL NOTICE—PLEADING.** The rule is well settled in Illinois that courts will not take judicial notice of city ordinances, nor are such ordinances admissible in evidence unless properly pleaded. (KERSTEN, J.)
11. **INDICTMENT—CONCLUSIONS IN.** In an indictment the *facts* constituting the offense must be set out. The indictment cannot be aided by the averment of conclusions of law or fact. (KERSTEN, J.)
12. **CRIMINAL NEGLIGENCE—LEGAL DUTY.** A defendant cannot be found guilty of manslaughter on account of alleged negligence in omitting to perform an act unless the law imposed a legal duty upon him to perform such act, or unless such duty had been directly assumed by contract or otherwise. (KERSTEN, J.)
13. **ALLEGATIONS OF INDICTMENT.** An argumentative averment of fact is not sufficient in an indictment. (KERSTEN, J.)
14. **COMMON-LAW DUTY.** In the absence of statute there is no duty on the part of the owner of a building to furnish fire apparatus,

and where it is not alleged that it was reasonably necessary or usual and customary to furnish such apparatus, the offense of manslaughter cannot be predicated upon a failure to so equip whereby death was caused. (KERSTEN, J.)

15. **ASSUMED DUTY.** An allegation that the defendants had undertaken the care, charge, management and control of a theater building and stage and that it became the duty of the defendants to see that the ordinances and laws in relation to the installation of fire apparatus and equipment were complied with, is not a sufficient allegation that the defendants had assumed or taken upon themselves the duty imposed upon the owner or lessee of the building to furnish such fire apparatus and equipment. (KERSTEN, J.)
16. **ALLEGATION AS TO DUTY.** An allegation that it was the duty of a defendant to perform certain acts is a mere conclusion of the pleader. (KERSTEN, J.)
17. **INVOLUNTARY MANSLAUGHTER—WILFUL ACT.** It is a serious question whether the offense of voluntary manslaughter can be "wilfully" committed. (KERSTEN, J.)
18. **MISJOINDER.** Whether several defendants who are charged with failure to perform several duties can be joined in the one indictment, doubted. (KERSTEN, J.)
19. **INDICTMENT—CONCLUSIONS.** An allegation that if certain fire equipment had been provided as required by an ordinance, a fire could have been extinguished, is a mere conclusion of the pleader. (KERSTEN, J.)
20. **ORDINANCES—DUTY UNDER.** An ordinance which provides that every building of a certain class shall be equipped with certain fire apparatus and equipment, but which does not specifically designate the person by whom the duty shall be performed, cannot be made the basis of an indictment for manslaughter against the manager, business manager or stage carpenter of a theater for criminal negligence in failing to comply with such ordinances, whereby death was caused. (GREEN, J.)
21. **PROXIMATE CAUSE—FAILURE TO SUPPLY FIRE APPARATUS.** Where a fire was caused in a theater building by a spark emitted from an electric light placed in close proximity to certain draperies upon the stage, and a large number of persons are burned to death, an indictment for manslaughter cannot be sustained for negligence in failing to equip the building with fire apparatus and equipment. The fire will be considered the proximate cause of the death, and not the failure to supply the fire apparatus and equipment, even though it is alleged that if such apparatus and equipment were installed, the fire would have been extinguished. (GREEN, J.)

22. MISJOINDER. The manager of a theater and building, the business manager of such theater and the stage carpenter thereof, cannot be joined in an indictment for manslaughter for an alleged failure to equip such theater and building and the stage thereof with certain fire apparatus and equipment. (GREEN, J.)

Indictment for manslaughter. Motion to quash. P. G. D. 76,382. Heard before Judges T. N. Green of Peoria county and George Kersten of Cook county.

Statement of facts.

The defendants were jointly indicted for the crime of manslaughter for negligently causing the death of one Viva R. Jackson. The defendant Davis was the manager of the Iroquois Theatre at Chicago, the defendant Noonan was the business manager thereof and the defendant Cummings was the stage carpenter in said theatre. On December 30, 1903, a fire broke out in said theatre and over 600 persons lost their lives. The defendants Noonan and Cummings moved for a change of venue on account of the prejudice of the inhabitants of Cook county and the case was removed to Peoria county. The defendant Davis then moved to quash the indictment. As a matter of convenience Judge T. N. Green of Peoria county, to which county the case of Noonan and Cummings had been transferred, sat with Judge Kersten on the argument of the motion to quash. That motion was granted and the same order was thereafter entered by Judge Green in Peoria county.

The indictment charged that on December 30, 1903, a certain building called the Iroquois Theatre was open and used for the purpose of producing and giving a performance of a spectacular play called "Mr. Bluebeard, Jr.;" that said building was before then planned, constructed and erected for the purpose of producing and giving therein plays; that there was then and there in the said theatre in said building a certain stage which had before then been erected; that said defendant Davis was before then, and then and there engaged "in a certain lawful business and act, to-wit, the business and act of managing generally said building and said Iroquois Theatre therein;" that the defendant Noonan was before

then, and was then and there engaged in a certain lawful business and act, to-wit, "the business and act of managing as business manager said building and said Iroquois Theatre therein," and that said Noonan was before then, and was then and there the business manager of said building and said Iroquois Theatre therein as aforesaid.

That said defendant Cummings was before then and was then and there engaged in a certain lawful business and act, to-wit, "the business and act of stage carpentering on said stage in said building and in said Iroquois Theatre," and that said Cummings was before then and was then and there the stage carpenter of said stage in said building and in said Iroquois Theatre.

That a certain law and ordinance of the city of Chicago, which was then and there in force and operation, did then and there require said building to have over the stage thereof a flue pipe (of certain dimensions) to be made of metal and be opened by a close circuit battery, and that a switch be then and there placed near the electrician's station on said stage, and have a sign thereon, said ordinance being as follows:

"Section 184. There shall be over the stage of every building of class V a flue pipe of sheet metal construction, extending not less than fifteen (15) feet above the highest part of the roof over the stage of said building—flue shall have an area of at least one-thirtieth of the total area of the stage. The dampers for flue shall be made of metal and opened by a close circuit battery; a switch to be placed in the ticket office and one placed near the electrician's station on the stage, each to have a sign and these words printed on it: 'Move switch to left in case of fire to get smoke out of building.' "

That said Iroquois Theatre was then and there a building of said class; that there was before then, and then and there in force a certain ordinance which required a system of automatic sprinklers (describing the kinds and manner of construction thereof), said ordinance being as follows, to-wit:

"Section 185. In every building of class V there shall be a system of automatic sprinklers to be supplied with water from a tank located not less than 20 feet above the highest part of

roof of building. Sprinklers shall be placed above and below the stage; also in paint room, store room, property room and dressing rooms, if they are in or connected with class V building and not separated by approved double iron doors. Tank not to be connected to stand pipe and ladder system, but to have separate pipe for filling from fire pump, and a 3-inch iron pipe extending from tank to outside of building, with siamese connections for fire department use. The entire sprinkler equipment to be approved by the commissioner of buildings, fire marshal and the board of underwriters of Chicago."

That stationary scenery was then and there used on said stage in said building as said defendants then well knew; that a certain ordinance was then and there in force, which did then and there require that there be then and there kept in said building for use portable fire extinguishers or hand fire pumps on and under said stage and in the fly gallery and rigging loft thereof, and which said ordinance is in the words and figures as follows:

"Section 188. In buildings of class V, and also class IV, where stationary scenery is used, there shall always be kept for use portable fire extinguishers or hand fire pumps, on and under the stage; in fly gallery and in rigging loft; also at least four (4) fire department axes, two twenty-five (25) feet hooks, two fifteen (15) feet hooks, two ten (10) feet hooks, on each tier or floor of the stage, all subject to the approval of the fire marshal."

That it was then and there the duty of said defendants and each of them, to then and there see that the said ordinances and laws of said city of Chicago were then and there complied with in respect to said building and said Iroquois Theatre, and to then and there have the things required by said laws and ordinances in and about said building, said Iroquois Theatre and said stage, as required by the said laws and ordinances; that each of said defendants were then and there empowered and vested with authority to purchase, procure and furnish each and all of said apparatus, appliances and things required by said laws and ordinances to be placed in and about said building * * * .

That there was not over said stage a flue pipe of, etc., as said defendants then and there well knew (and all of the other things described) then required by said ordinances, as said defendants well knew; that said defendants "then and there negligently failed and omitted to have in and about said building, said Iroquois Theatre and said stage, the matters and things aforesaid, so required by said laws and ordinances of said city of Chicago, as aforesaid;" that said theatre was then and there opened to the public to witness the production of said certain theatrical performance, as said defendants well knew; that said Davis "then and there had and took upon himself the care, charge, management and control of said building and of said Iroquois Theatre," and that said Noonan "then and there had and took upon himself the care, charge, management and control of the business of said building and said Iroquois Theatre," and that said Cummings "then and there had and took upon himself the care, charge, management and control of the said stage, as stage carpenter thereof, as aforesaid;" that it was then and there the duty of said defendants to use due caution and circumspection for the safety of the persons then and there assembled as aforesaid, and to then and there have in and about said stage the fire appliances, apparatus and things aforesaid "mentioned and by said laws and ordinances of said city of Chicago provided and required as aforesaid, for the safety of the said persons so then and there assembled, as aforesaid, to witness said theatrical performance, spectacle and play as aforesaid."

That one Viva R. Jackson was then and there among and was then and there one of the said large number of persons so then and there assembled to witness the production of said certain theatrical performance; that said defendants, on said December 30, 1903, while so then and there having the care, charge, management and control of said building, * * * and while the said Jackson was then and there in said theatre witnessing the said theatrical performance, and during the progress of the same in and upon the body of said Jackson "did unlawfully, negligently, feloniously and wilfully, and without due caution and circumspection, make an assault;" that a certain lighted arc lamp was then and there, during

the progress of said performance, "negligently and carelessly and without due caution and circumspection put, placed and kept near a certain drapery, which was then and there situated on, in and about said stage," by reason of which said putting "said drapery was then and there ignited and set on fire by said arc lamp;" that "said fire could then and there have been easily extinguished had there then and there been in said building and on said stage the required proper fire apparatus, appliances and things required by said laws and ordinance of said city of Chicago;" that by reason of the lack of said fire apparatus, appliance and things "as aforesaid, required by said ordinances and laws," said fire was not extinguished, the said defendants knowing that there was a large amount of combustible and inflammable material on said stage, near said drapery, which was then and there ignited and set on fire, then and there causing a large amount and quantity of smoke to then and there be upon and over said stage, and that by reason of the lack of an open flue in the roof over said stage, as required by said ordinances, said smoke did not go through said roof of said stage and was not confined to said stage, and that by reason of the lack of said automatic sprinklers, as required by said ordinances, said fire could not be extinguished and put out; that if there had been the proper flue, dampers and switches, as required by said laws and ordinances, a large amount of fire, smoke, gas and flame could have gone through said roof, and would then and there have gone through said roof, and if there had been sprinklers, as aforesaid, said fire could have been extinguished and put out by the same; that by reason of the lack of said apparatus, appliances and things, so required by said laws and ordinances, said large amount of fire, heat and flame was not then and there thrown off, and was not then and there extinguished and put out, and was not then and there confined to said stage; that said defendants did, then and there, by their said negligence in not providing said appliances aforesaid required by said laws and ordinances for the safety of said persons, and in not seeing that said apparatus and things were then and there in and about said building, as re-

quired as aforesaid, "and by their then and there being engaged in their said lawful business and act without the due caution and circumspection, which was their duty so then and there to use, unlawfully, negligently, feloniously and wilfully caused a large amount of said fire, smoke, heat, gas and flame" to pour and go from said stage towards, against and upon a large number of persons then and there assembled in said theater, and to, against and upon said Jackson, then and there being in said building, and in said Iroquois Theatre as aforesaid, whereby and by reason of said large amount of fire, gas and flame against said Jackson, the body of said Jackson was then and there mortally burned, and said Jackson was then and there asphyxiated, strangled and choked, and said Jackson did languish and thereafter died on said December 30, 1903.

That the death of said Jackson was then and there caused by said negligence of said defendants "by their not then and there providing for, and by their not then and there seeing that the same were then and there provided, the apparatus, appliances and things aforesaid required as aforesaid, to be in and about said building and said stage, for the protection of the life of said Jackson," and by their then and there not using due caution "while so being engaged in their said lawful business and act, as aforesaid, as well as by their said carelessness and negligence in then and there putting, placing and keeping said arc lamp, as aforesaid;" that said defendants the said Jackson "in manner and form aforesaid, did then and there negligently, feloniously, unlawfully and wilfully kill and slay, contrary to the statutes, and against the peace and dignity of the people of the state of Illinois."

John J. Healy, state's attorney, *A. C. Barnes* and *Harry Olsen*, assistant state's attorneys for the people.

Levy Mayer, *Alfred S. Austrian*, *Moritz Rosenthal*, *W. J. Hynes*, *E. C. Higgins* and *Howard O. Sprogle*, for defendants.

KERSTEN, J.:—

At the last February term, the defendants were indicted on the charge of manslaughter. A motion to quash the in-

dictment having been made and fully argued, it is now the duty of the court to pass upon the sufficiency of the indictment.

It seems that at common law, the motion to quash was considered addressed to the sound discretion of the court. 1 Bish. Crim. Proc. (3rd. ed.), § 763; 1 Chitty, Crim. Law. 299; Archbold, Crim. Pleadings & Practice, p. 35; 2 Hawk. P. C., chap. 25, sec. 146; *State v. Wilson*, 43 N. H. 415, 82 Am. Dec. 163; 10 Ency. of Pleading & Practice, 567; *Ex parte Bushnell*, 8 Ohio St. 599, 600, 601; *State v. Dayton*, 23 N. J. Law, 49, 53.

This rule of practice seems never to have been adopted in Illinois. It is true the supreme court said in one case:

“But if it appear before the defendant has pleaded or the jury are charged, that he is to be tried for separate offenses, it has been the practice of the judges to quash the indictment, * * * *but these are only matters of prudence and discretion.*” *Thompson v. People*, 125 Ill. 256, 260 (quoting from the opinion by Buller, J., in *Young v. King*, 3 Term Rep. 106).

But, in practice, our courts of review have uniformly treated the decision of the trial court, overruling a motion to quash, as matter upon which error might be assigned. *Lamkin v. People*, 94 Ill. 501, 505; *Gunning v. People*, 189 Ill. 165, 171; *Cochran v. People*, 175 Ill. 28, 32; *McNair v. People*, 89 Ill. 441, 444, 445. It would, therefore, seem to be clearly the duty of the court in this case to quash the indictment if, as a matter of law, it is insufficient to sustain a conviction.

The state contends that under the statutes of Illinois concerning involuntary manslaughter, a conviction may be sustained upon proof of a smaller degree of negligence than was necessary thereto at common law, the contention being—as stated in the brief of the state’s attorney that “at common law the negligence which resulted in death, in order to be the basis of a criminal charge of manslaughter, must have been *gross negligence*; while under the statute, negligence, in order to be the basis of a charge of manslaughter, must have

been of such character as to amount to the performance of a lawful act without due *caution and circumspection*."

On the other hand, counsel for the defense, in their contention, go to the other extreme and urge that, in order to constitute the crime of involuntary manslaughter under the statutes of this state, the *unlawful act* committed or the *unlawful manner* of committing a lawful act, must be "unlawful" in the sense that it is in direct violation of some statute or public law of the state.

According to the contention of counsel for the state in this case, the statutory definition of involuntary manslaughter in Illinois is much broader than it was at common law; whereas counsel for the defense contend that it is narrower than at common law. Let us examine these statutes. The statutes relating to involuntary manslaughter in this state are as follows:

"Section 143. Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary in the commission of an *unlawful act*, or a *lawful act without due caution or circumspection*."

"Section 145. Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an *unlawful act*, or a *lawful act, which probably might produce such a consequence, in an unlawful manner*."

The statutes as to *excusable* homicide are as follows:

"Section 152. Excusable homicide by misadventure is when a person in doing a lawful act, without any intention of killing, yet unfortunately kills another, as where a man is at work with an axe and the head flies off and kills a bystander, or where a parent is moderately correcting his child, or master his servant or scholar, or an officer punishing a criminal, and happens to occasion death, it is only a misadventure, for the act of correction was lawful; but if a parent or master exceed the bounds of moderation, or the officer the

sentence under which he acts, either in the manner, the instrument or quantity of punishment, and death ensue, it will be manslaughter or murder, according to the circumstances of the case.

“Section 153. All other instances which stand upon the same footing of reason and justice as those enumerated, shall be considered justifiable or excusable homicide.”

All four of these sections are taken from the original Criminal Code of this state, first enacted by the legislature of 1827 (Revised Laws of Illinois of 1827, pages 128, 130; sections 25, 28, 37, 38) and were embodied without change in the Revisions of 1833 (Revised Laws of Illinois, 1833, pages 175, 177, sections 25, 28, 37, 38) and of 1845 (Revised Statutes of Illinois, 1845, pages 155, 157, sections 25, 28, 37, 38); and again by the legislature of 1874, in our present Criminal Code.

Being thus all parts of the same act, they must, of course, be construed together, and so as to give effect to every part of each section, and to make one harmonious whole. In considering the true meaning and construction to be put upon them, several well-established canons of interpretation of statutes must be borne in mind. It is to be remembered that the law does not favor the repeal of the common law by implication. Nor will it be presumed that the legislature, in enacting a statute, intended to legalize acts which, by the common law, are opposed to public policy or which tend to the demoralization of society. *Swigart v. People*, 154 Ill. 284. And a statute is not to be construed as changing the common law any further than its terms expressly declare. *Can. Bank of Com. v. McCrea*, 106 Ill. 281, 289; *Cadwallader v. Harris*, 76 Ill. 370, 372.

And, so, a statute will not be construed to repeal, by implication, a rule of the common law, unless the implication is absolutely imperative. *Deatherage v. Rohrer*, 78 Ill. App. 248, 251; *Smith v. Laatsch*, 114 Ill. 271, 276, 279. Citing and quoting with approval, Potter's Dwarries on Statutes, page 185. See also *State v. Wilson*, 43 N. H. 415, 82 Am. Dec. 163, 164.

Thus it will appear that the tendency of the courts will be rather, in the absence of a clearly expressed intention of the legislature to the contrary, to construe a statute as declaratory of the common law instead of in derogation thereof; and a mere change in the phraseology is not necessarily to be construed as indicative of an intention to change the substance of the law.

Again, it is an established rule of construction that when a term or word which had a well-known common-law meaning—as, for instance, the phrases “without due caution or circumspection,” “unlawful act,” “in an unlawful manner”—is used in a statute, it will be understood, in the construction of the statute, in the same sense as at the common law. *Bedell v. Janney*, 4 Gilm. 193, 205, 206. And the presumption will be indulged that the same words,—as, for instance, the term “involuntary manslaughter”—are intended to have the same meaning when used in different places in the same act; and the meaning of a word or phrase may often be ascertained by reference to others with which it is associated.

In applying these principles to the construction of the statutes under consideration, it becomes important to ascertain, first, whether or not the statutes of Illinois relating to involuntary manslaughter are declaratory of the common law; or whether the common law on that subject has been abrogated in this state; and, if so, then what, exactly, is the meaning of our statutes. “Manslaughter,” at common law, is defined by Blackstone, as follows:

“Manslaughter is, therefore, thus defined: the unlawful killing of another without malice, either express or implied; which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act.” (p. 191.)

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this, that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. • • • So, where a person does *an act lawful in*

*itself, but in an unlawful manner, and without due caution and circumspection, as when a workman flings down a stone or piece of timber into the street and kills a man, this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder if he knows of their passing and gives no warning at all, for then it is malice against all mankind. And, in general, when an involuntary killing happens in consequence of an *unlawful* act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or, in its consequences, naturally tended to blood-shed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter."* 4 Blackstone, Com. (Cooley's ed.), pp. 191, 192, 193.

Again, Blackstone says of excusable homicide: "Homicide *per infortunium* or misadventure is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person qualified to keep a gun is shooting at a mark and undesignedly kills a man, for the act is lawful and the effect is merely accidental. So, where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only a misadventure; for the act of correction is lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument or the quantity of punishment, and death ensues, it is manslaughter at least and, in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. * * * (p. 182). Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful; but manslaughter in the person who whipped him,

for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequences. And in general, if death ensues in consequence of an idle, dangerous and unlawful sport, as shooting or casting stones in a town * * * in these and similar cases the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts." 4 Blackstone, Com. (Cooley's ed.), pp. 182, 183.

It will be observed that our statute concerning excusable homicide is copied almost word for word from Blackstone's definition of homicide by misadventure, and also that the word "unlawful" as used in these common-law definitions quoted from Blackstone, includes not merely acts which are in themselves violative of some public law, but also acts amounting to mere civil trespass; and such was the undoubted common-law acceptance of this term, as used in the law of homicide.

Bishop says, "Every act of gross carelessness, even in the performance of what is legal, * * * and every negligent omission of a legal duty, whereby death ensues," is either murder or manslaughter at common law. 1 Bishop, New Criminal Law, 8th ed., sec. 314. And, again, the same author says that the term "unlawful act" as used in the law relating to manslaughter, "is not restricted to what is indictable, but it includes what is contrary to or reprehensible under any law, civil or criminal." 2 Ibid., sec. 642, par. 2.

To the same effect, see also 1 Archbold, Criminal Pl. & Prac., pp. 209, 210, 216, 217, 219; *Regina v. Marriott*, 8 Car. & P., 425, 433. And so it was manslaughter at the common-law where the death of another occurs through the defendant's negligent use of dangerous agencies. Wharton on Homicide, par. 6. And the care required to make the killing excusable must have been in proportion to the danger. Wharton on Homicide, par. 155. But the neglect, to be "unlawful," must amount to an omission of some legal duty, not a mere neglect of a social or moral duty only.

It must be presumed, as already observed, that the legislature, in making use of the words, "unlawful," "in an unlawful manner," in these statutes, intended to employ them

in the same sense in which they were understood at common law. And the supreme court of this state has treated those sections of this same act, which define the crime of murder, as declaratory of the common law; and has cited and relied upon the common-law definitions of that crime. *Butler v. People*, 125 Ill. 641, 644, 645. And, inferentially at least, it has very recently treated the section of the criminal code defining justifiable homicide, as declaratory of the common law. *Hayner v. People*, 213 Ill. 142, 151. And in that connection has treated the word "unlawful" as including mere civil trespass, and as being used in the same sense in the statutes relating to murder as was attached to it at common law. And, at common law, our supreme court has said the word "unlawful" includes civil, as well as criminal, wrongs, and trespasses which are not positively violative of any statute, civil or criminal. *Smith v. People*, 25 Ill. 17, 24. And, in another case, the court set off the words "criminal" and "unlawful" against each other, as of different meanings. *Heaps v. Dunham*, 95 Ill. 583, 586.

It can not be presumed that the legislature intended to leave any gap or *hiatus*, on the one hand between excusable homicide and involuntary manslaughter, or on the other hand between manslaughter and murder. The section of the statute defining excusable homicide is, as appears from the quotation from Blackstone, *supra*, undoubtedly declaratory of the common law, and, as above noted, that relating to murder has been so treated by our supreme court. Those sections of this act defining the two extremes, namely, excusable homicide and murder, being thus declaratory of the common law, it must be presumed that the sections of the same act defining the middle ground of manslaughter were likewise intended to be declaratory of that law, unless the language of the act clearly forbids such presumption. The court will be the more ready to indulge this presumption in view of the rule of interpretation above noticed, that a repeal of the common law by implication is not favored.

Reading the two sections as to involuntary homicide, as quoted above, together, it appears that they practically fol-

low the wording of Blackstone's definitions of that crime, with only a slight transposition and change of the phraseology. The statute says: "Manslaughter * * * must be voluntary * * * or involuntary in the commission * * * or a lawful act without due caution or circumspection (sec. 143). Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of * * * a lawful act which probably might produce such a consequence, in an unlawful manner (sec. 145). Blackstone says it is manslaughter: "Where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection" (4 Blackstone, Com., *supra*, p. 192).

The phrases used both in the statute and by Blackstone are practically identical, and both the statute and Blackstone treat the terms "in an unlawful manner" and "without due caution and circumspection" interchangeably. In Blackstone they are used together in the same sense, and in immediate juxtaposition. In the statute (bearing in mind that it must be presumed that the legislature meant to use the term "involuntary manslaughter" in the same sense in both sections of the statute) they are likewise used as convertible terms. The only new clause introduced into the statute consists of the words, "which probably might produce such a consequence" (sec. 145); which seem to be nothing more than a positive enactment of the established common-law rule that the unlawful act or omission, charged against the defendants, must have been the proximate cause of the death.

It is true that the rule is stated to be: "A statute which is an entire revision of the subject is negative and repeals the common-law with which it is inconsistent." 26 Ency. of Law, 2d ed., 530; *State v. Wilson*, 43 N. H. 415, 82 Am. Dec. 163, 165; *Ill. & Mich. Canal v. Chicago*, 14 Ill. 334, 336.

But the supreme court of this state has held that the criminal code of 1845 (of which our present code of 1874 is substantially a re-enactment) was not intended by the legislature as a complete codification of the criminal laws of this state; and that the common law on that subject remains in force in

Illinois except in so far as it is expressly repealed or changed by a statute. *Johnson v. People*, 22 Ill. 314; *Smith v. People*, 25 Ill. 17, 25.

On the whole, I am of the opinion that our statutes defining the crime of involuntary manslaughter are substantially declaratory of the common law, and I will so hold. As a necessary corollary to this holding, it follows that the statute is to be construed as was the rule by the common law (26 Ency. of Law, 2d ed., p. 529), and that the court may properly resort to the common-law precedents for aid in determining whether the particular acts or omissions alleged in this indictment, fall within the definition of the crime.

Does the indictment before us in this case sufficiently charge the offense of involuntary manslaughter within the meaning of the common-law precedent?

It charges, in substance, that the defendant Davis was the general manager of the Iroquois Theatre and building; that defendant Noonan was business manager of said theatre and building; and that defendant Cummings was the stage carpenter of said theatre; that there were then in effect valid ordinances of the city of Chicago, requiring that in buildings of the class of this theatre, certain equipment shall be provided; that the equipment required by the ordinances was not in this theatre, that the defendants, and each of them, had the power and authority to provide that equipment and neglected to do so; that if the equipment required by the ordinances had been provided, the death of the decedent would not have occurred; that thus the defendants negligently and wilfully caused the death of the decedent. None of the sections of the ordinances, set out in the indictment, declare upon whom the duty of furnishing the equipment, thereby required, is imposed; and, in the absence of such a provision in the ordinance, it must be presumed that it was the intention of the city council to impose the duty upon the owner or lessee of the building. *Arms v. Ayer*, 192 Ill. 601, 616. And it is not averred in the indictment that either of the defendants sustained that relation to the property.

The state's attorney in his brief has quoted some other sec-

tions of the building ordinance of the city of Chicago, which he contends should be considered by the court as showing that the city council intended to impose the duty of furnishing this equipment upon the persons occupying the relation to the property which, it is alleged in the indictment, the defendants occupied in this case; and he cites several decisions from the courts of other states to the point that these sections of the ordinance would be admissible in evidence upon a trial, under this indictment, without pleading them. He argues, therefore, that the fact—or the possibility—of their existence should be considered by the court in passing upon this motion to quash the indictment.

None of the cases cited sustain the state in this contention, except two of the cases cited from Minnesota (*Faber v. St. Paul, M. & M. Ry. Co.*, 29 Minn. 465, 13 N. W. 902; *Klotz v. Winona, etc., Ry. Co.*, 68 Minn. 341, 71 N. W. 257), both of which were civil actions to recover damages for personal injuries sustained by the plaintiffs. In those cases the supreme court of Minnesota does lay down the rule that, in that state, a city ordinance is admissible in evidence in an action for damages for personal injuries, as tending to prove negligence on the part of the defendant (in connection with proof that it was violated by the defendant), even though the ordinance had not been pleaded by the plaintiff. This rule is, of course, in direct opposition to the settled law of this state, which is that the courts of Illinois do not take judicial notice of city ordinances, and that such ordinances cannot be introduced in evidence in support of an averment of negligence in common-law actions, unless the existence of the ordinance has been properly pleaded. Our supreme court has said:

“Courts do not take judicial notice of an ordinance of an incorporated town or city—and, hence, when they may be material in an action or in the defense of an action they must be specially pleaded. * * * The pleader was not required to set out the ordinance *in hæc verba*, but he was required at least to set out the substance of the ordinance. * * * That part of the ordinance relied upon, or all the substantial parts of the ordinance, should be set out, so that the require-

ments of the ordinance may be seen and known." *Ill. Cen. R. Co. v. Ashline*, 171 Ill. 313, 315, 316.

And this is believed to be the usual rule, in almost all the states of the union. Neither of the cases cited by the supreme court of Minnesota in the Faber case, *supra*, (29 Minn. 465, 467, 13 N. W. 902) support the doctrine announced in that case; and the Klotz case, *supra* (68 Minn. 341, 71 N. W. 257), was decided solely upon the authority of the Faber case. The doctrine of the Minnesota court is opposed to the general current of authority on this question.

It is familiar law, applicable to criminal, as well as civil, pleadings, that facts sufficient to establish the offense charged must be set out in the indictment, and that a failure in this respect cannot be aided by allegations of the conclusions of the pleader. "In every indictment, facts must be averred which, in the eye of the law, constitute the charge." *Rank v. People*, 80 Ill. App. 40, 43. It is a fundamental rule, both of civil and criminal pleading, that facts and not conclusions of law must be averred. *Ibid*, at pages 43, 44.

And this indictment must stand or fall by the allegations of fact appearing upon its face. It cannot be aided by any consideration of other matters, of which the court cannot take judicial notice; and, if the case were permitted to go to trial upon it, it could not be aided by the introduction of any evidence or proof of facts not properly averred in the indictment. The familiar rule of pleading applies in indictments as well as to all other common-law pleadings, that "proofs without allegations are as ineffectual as allegations without proofs." *Gunning v. People*, 189 Ill. 165, 166.

The court cannot consider any sections of the city ordinances except those properly pleaded; and under the rule of law announced by our supreme court in the case of *Arms v. Ayer*, *supra*, 192 Ill. 601, 616, the duty of providing the equipment required by the ordinances rested upon the owner or lessee of the building, and there is no direct averment in this indictment that that duty had ever been assumed in any way by the defendants in this case, or either of them. It is not denied by the state that the defendants cannot be found guilty of

manslaughter, on account of any alleged negligence in omitting to perform any act, unless there was a legal duty to perform that act directly imposed upon them by law—either statutory, or municipal, or by the common law—or unless they had voluntarily, by contract or otherwise, directly assumed the duty of its performance.

“It is likewise essential that the party charged must be obligated to do what he omitted to perform, by the terms of some contract, by which he is bound, or the law must have cast on him the obligation of performance.” *Thomas v. People*, 2 Colo. App. 513, 31 Pac. 349, 350.

Neglect or omission, to be “unlawful,” must be an omission of some legal duty—not a mere neglect of a social or moral duty. 2 Bishop, *New Criminal Law*, 8th ed., secs. 642, 644, 645; 21 Ency. of Law, 2d ed., p. 99. It is true that “if a man takes upon himself an office requiring skill or care if by his ignorance, carelessness or negligence, he cause the death of another, he will be guilty of manslaughter.” 1 Archbold, *Crim. Pl. & Prac.* p. 220 (Pomeroy’s ed.) p. 665.

So, the case of a mine foreman neglecting his duty and allowing fire damp to collect, whereby a fatal accident happens, has been held manslaughter; and, likewise, that of an iron foundry who cast a cannon so imperfectly that it burst, with fatal results; and, for like reasons, surgeons and physicians are similarly liable for gross carelessness, whereby their patients die; but it is nowhere positively alleged in this indictment that these defendants, or either of them, ever took upon themselves the duties imposed by this city ordinance upon the owner or lessee of the building. It is averred that each of the defendants was empowered and vested with authority to purchase, procure and furnish each and all of said apparatus, appliances and things required by said laws and ordinances to be placed in and about said building, and that said defendants “then and there negligently failed and omitted to have in and about said building, said Iroquois Theatre, and said stage, the said matters and things aforesaid, so required by said laws and ordinances of said city of Chicago aforesaid,” and that said Davis “then and there had and took upon himself the

care, charge, management and control of said building, and of said Iroquois Theatre," and that said Noonan "then and there had and took upon himself the care, charge, management and control of the business of said building, the said Iroquois Theatre," and that said Cummings "then and there had and took upon himself, the care, charge, management and control of the said stage, as stage carpenter thereof." That it was then and there the duty of said defendants to "see that the said ordinances and laws" were complied with, and to then and there have in and about said stage the fire appliances, apparatus and things aforesaid mentioned and by said laws and ordinances of said city of Chicago provided and required as aforesaid, for the safety of the said persons so then and there assembled as aforesaid, to witness said theatrical performance, spectacle and play.

But this does not amount to a direct and positive allegation that the defendants, or either of them, had ever assumed or taken upon themselves the duty imposed, under this ordinance, upon the owner or lessee of the building, to furnish this equipment. It is not a *necessary* inference from the averment that the defendant Davis had taken upon himself the "care, charge, management and control of said building," and that Noonan had taken upon himself the "care, charge, management and control of the business of the building," and that Cummings had taken upon himself the "care, charge, management and control of the stage, as stage carpenter thereof," that the defendants, or either of them, had taken upon themselves the duty imposed by law, under the ordinances set forth in the indictment, of furnishing this equipment for the building. *Non constat*, but that the defendants merely assumed the management and control of the property as they found it; and did not by any contract or agreement with the owner of the building, or otherwise, specifically agree to attend to furnishing the articles or equipment required by the ordinance. The words "manage and control" would not seem necessarily, in the absence of any further averments, to include a duty to furnish equipment itself, or the fixtures of the building, without a specific agreement to

undertake those duties. The most that can be said is that it might be inferred or argued from these averments that the defendants had taken that duty upon themselves. But an argumentative averment of fact is not sufficient, in an indictment. The *facts* necessary to constitute the offense must be charged in direct and positive terms. Thus, where, in an indictment for bigamy, it was alleged in the indictment that the defendant, at the time of his second marriage, *knew* that his first wife was then living, it was held by our supreme court that this was not a positive or direct averment that the first wife was actually living on that date; and the indictment was quashed for insufficiency in this respect, the court saying:

“Reliance is placed upon the averment that the defendant, at the time of his second marriage, *knew* that his first wife was living. If this is to be taken as an allegation that his former wife was then living, it was merely argumentative. The allegation being that the defendant knew that his former wife was living, it is sought to be inferred, by way of argument, that she must have been in fact living, but it is an elementary rule of pleading, both civil and criminal, that allegations of fact in pleading should be direct and positive and not merely argumentative or inferential.” *Prichard v. People*, 149 Ill. 50, 54.

And so also the indictment against Richard Gunning, formerly assessor of the town of South Chicago, was recently held insufficient by the supreme court for a similar reason, the court saying:

“The point is also made that from the allegation that Gunning offered to receive the alleged bribe to influence his official action as assessor, in reducing the assessment on the said lot (*id est*, the lot described in the indictment), it is properly deducible that, as his official action was confined to the assessment of property in the town of South Chicago, the lot must have been situated in that town. It is not permissible in pleading to leave a fact necessary to be averred to be derived by inference from an allegation of a mere conclusion of law. All necessary facts should be pleaded with reasonable certainty, and section 6, of division 11, of the criminal code

has not dispensed with that rule.” *Gunning v. People*, 189 Ill. 165, 171.

So also in the case of *People v. Davis*, 112 Ill. 272, which was an action of debt to recover delinquent taxes, it was held on demurrer that a declaration was insufficient in law which failed to state the facts from which the liability as a conclusion of law resulted: that the averment that the property was taxable at the place in which it was assessed, was the statement of a conclusion of law and was bad on demurrer (at pp. 281, 282).

This last mentioned case was cited with approval in the *Gunning* case, *supra* (189 Ill. 171). The averment in the indictment in the case at bar “that it was then and there the duty of said defendants to then and there have in and about said stage,” the fire appliances, apparatus and things “mentioned and by said laws and ordinances of said city of Chicago provided and required,” is merely the conclusion of the pleader and, under the authorities last cited, is wholly ineffectual to sustain the indictment unless facts sufficient to warrant the conclusion are properly averred. See also case of *Rank v. People*, 80 Ill. App. 40, 43, 44, *supra*.

In my judgment, the indictment is not sufficient to sustain a conviction for a violation of any supposed duty imposed upon the defendants, or either of them, by the ordinances of the city of Chicago as pleaded. *It remains to consider whether it sufficiently charges the defendants with the crime of involuntary manslaughter, by reason of their neglect of any common-law duty resting upon them.*

I have already quoted the material averments of the indictment, as to the duties charged to have been assumed by the defendants respectively, and as to their violation thereof. It is nowhere alleged in the indictment that the equipment, or any part of it, required by the said ordinance, was reasonably necessary in buildings of that class, for the protection of the patrons of the theatre; nor that such equipment was usually or customarily furnished; nor are any other facts directly or positively averred tending to show that it was negligence on the part of the defendants, or either of them, aside from any

requirements of the city ordinances, to fail to provide the equipment which, it is charged, was lacking. It is true that it is averred that if the equipment mentioned and which was required by the ordinance, had been furnished the fire *could* have been easily extinguished, but this, again, if relied upon as an averment that this equipment was reasonably necessary to the safety of the patrons of the theatre, is, at most, but an argumentative or inferential statement thereof, and, as such, wholly insufficient under the authorities above cited (*Prichard v. People*, 149 Ill. 54; *Gunning v. People*, 189 Ill. 171); and again, in this aspect of the case, as in the other, the allegations of the pleader's mere conclusion that it was the duty of the defendants "to then and there have in and about said stage," the fire appliances, apparatus and things "mentioned and by said laws and ordinances of said city of Chicago provided and required," is wholly insufficient to supply the lack of averment of facts. The pleader must aver facts, not merely conclusions, in order to make the indictment good.

I am constrained to the conclusion that the indictment does not charge the defendants with any offense, either by reason of the omission of any duty imposed upon them by any ordinances of the city of Chicago averred in the indictment, nor by reason of the omission of any common-law duty resting upon them. I am, therefore, of the opinion that the indictment is insufficient and the motion to quash it should be sustained.

This view of the case renders it unnecessary to consider the other questions raised by counsel upon the argument and discussed in their briefs. It seems, however, proper to say that the question of the effect of the word "wilfully" in that part of the indictment for *involuntary* manslaughter alleging assault, which is raised by counsel for the defendants, is to my mind a serious one; and I also entertain grave doubts as to the propriety of joining these defendants in the same indictment. It is not, however, necessary to discuss or consider these questions at the present time.

In view of what has been said, I believe that the interests of the public, and of the prosecution itself, will be subserved

by quashing this indictment. I am convinced that no conviction that might be had upon it could be sustained upon review.

Since no statute of limitations runs against the crime of manslaughter, no serious inconvenience will be entailed upon the people by quashing this indictment. It would not, in my opinion, be right to permit a long and expensive trial to be had upon an indictment, the sufficiency of which is so questionable, or—rather—the insufficiency of which is so unquestionable, as is that of the indictment in the case at bar. The difficulties and embarrassments that beset the state's attorney in preparing an indictment in so unusual and even extraordinary a case as this, are fully appreciated. The prosecution has now, however, had the benefit of its own careful legal research preparatory to the arguments upon the motion to quash this indictment, and of the very elaborate and able briefs prepared by counsel for the defendants and, with this aid, will doubtless be in much better position to draft another and legally sufficient indictment, in case another grand jury should find that the defendants, or either of them, or any other persons, can lawfully be charged with being criminally accountable for that terrible disaster.

The motion, on behalf of the defendant Davis, to quash the indictment is sustained.

GREEN, J.:—

Through the courtesy of Judge Kersten, and the gentlemen representing the defendant in this case, I was invited to be present and listen to the arguments on the motion to quash, and was advised at the same time, that I would be furnished by counsel representing the defendants Noonan and Cummings, with printed briefs, with the understanding that in the near future I would be able to pass upon the motion to quash in the case of *The People, etc. v. Noonan and Cummings*, under the same indictment, supposing that a transcript of the record in that case would be filed in Peoria county, Illinois, but upon examination I have ascertained that the transcript of the record has not been filed there.

It seems to me it would be proper, under the circumstances, to devise some means whereby the order changing the venue to Peoria county as to the defendants, Noonan and Cummings, might be vacated, in which event the motion to quash in their behalf could be passed upon and determined by Judge Kersten. I will state to counsel that I have read, and heard read, the opinion of Judge Kersten in the Davis case and that I am in full accord with the views expressed by him in that opinion. In addition thereto I deem it proper to state that it is apparent to me the indictment in this case is predicated upon an ordinance of the city of Chicago set up *in hæc verba* in the indictment, that all of the alleged acts of negligence charged against the defendants, and each of them, are manifestly based upon alleged neglect of duty on their part to comply with the provisions of this ordinance. I recall one particular feature with reference to the switch in case of fire. The ordinance provides that there shall be a switch placed near the ticket office and one near the electrician's stand on or near the stage, each switch to then and there have a sign with the words as follows, to-wit: "Move switch to left in case of fire to get smoke out of building." In my judgment all of the alleged acts of negligence on the part of these defendants, and each of them, relate to, or are connected directly with, the provisions of this ordinance.

The sole object and purpose of pleading the ordinance in this case is to advise the court with reference to the provisions thereof so far as it relates to these defendants and the Iroquois Theatre building; and also, that the court might be enabled on an inspection thereof to ascertain what duties, if any, devolved upon these defendants, or either of them thereunder. It certainly does not seem to me, that the pleader in this case is warranted in the conclusion reached by him under the averments of this indictment as to the alleged duty of these defendants, or either of them. The court, upon a careful reading of this ordinance, fails to discover that it imposes any special duty upon all, or any, or either of these defendants. It certainly is not the duty of the court to criticise the indictment, or sustain a motion to quash the same, upon

mere technical grounds, and if the indictment is to be quashed it should be by reason of some substantial defect. It appears to me, that the direct and proximate cause of this terrible disaster was not brought about, or occasioned, by reason of the alleged fact that these defendants (even had the duty devolved upon them as alleged in the indictment) had not placed in said theatre building the flue pipe of sheet metal construction, the automatic sprinkler and other appliances therein enumerated, but the direct cause was the fire itself. The object and purpose of these safe-guards was to do away with the smoke in case of fire and, at the same time, provide means for extinguishing the same. It is also alleged in the indictment that a certain lighted arc lamp was being operated on the south side of the stage in said theatre during the progress of said theatrical performance therein mentioned, negligently and carelessly and without due caution and circumspection, put, placed and kept near a certain drapery which was then and there situated on, in and about said stage, by reason of which said putting, placing and keeping said arc lamp near said drapery, said drapery was then and there ignited and set on fire by said arc lamp, which said fire could then and there have been easily extinguished had there then and there been in said building, and on said stage, the fire apparatus, appliances, etc., as required by said laws and ordinances of said city of Chicago, and which said fire could then and there have been easily extinguished and put out if there had then and there been in said building, and on said stage, any portable fire extinguishers, or hand fire pumps, as provided by said ordinances.

It will be observed that there is no averment in this indictment to the effect, that these defendants, or either of them, placed, or caused to be placed, or exercised, or attempted to exercise, any control over said arc lamp; neither are they charged with negligence or lack of due caution and circumspection, relative to said lamp. Every intendment being against the pleader, the presumption is, that said arc lamp was not placed there by these defendants and that they did not, or either of them exercise, or attempt to exercise, any control

over the same. In my judgment the lack of an averment of this character is fatal to this indictment, and if *for no other reason*, the indictment, on motion to quash, should not be sustained.

In passing, I desire also to state, that it is my judgment, that there is no privity between these defendants and that a motion to quash should be sustained on the ground of a misjoinder. I realize fully how difficult it is to draw an indictment to fit the facts, or the alleged facts, in this case. It is easy to find fault with an indictment and yet more difficult to draw it. So I am inclined to hold, in addition to the reasons given by Judge Kersten, and for the reasons therein indicated, that these substantial objections to this indictment should be sustained. It does not appear to me to be proper at this time or place to pass upon the motion to quash in behalf of the defendant Noonan and Cummings, but when the case properly comes before me at Peoria, I will say frankly to counsel, that I shall not hesitate to sustain a motion to quash for the reasons herein indicated.

(Criminal Court of Cook County.)

The People of the State of Illinois

vs.

William J. Davis.

(January 23, 1906.)

1. **FIRE APPARATUS—DUTY TO PROVIDE.** There is no duty at common law requiring the owner or occupant of a building to provide fire-escapes and fire apparatus.
2. **PLACES OF AMUSEMENT—DUTY TO PROVIDE SAFE PLACE.** Proprietors of places of amusement are bound to provide a safe place for their patrons and to exercise reasonable care for their safety.
3. **DUTY—NECESSITY OF.** Where there is no duty imposed either by law or contract upon a particular person to do a particular act, no penalty can be imposed upon him for its non-performance.

¹ See also *People v. Davis, et al.*, 1 Ill. C. C. 217, for a contrary decision on a prior indictment for the same offense.—Ed.

- ance. The duty must be a plain one and the person who must perform it must be specifically designated.
4. **STATUTES—ORDINANCES—DUTY TO UPHOLD.** It is the duty of courts to so construe all legislative enactments as to uphold their validity if it can reasonably be done.
 5. **ORDINANCES—DUTY TO COMPLY WITH.** Although an ordinance providing for the installation of certain fire apparatus in buildings of a certain class fails to designate the person who shall perform the duty, it is a violation of the ordinance to use and occupy a building constructed in violation of the law, without complying with the ordinance.
 6. **ORDINANCE—INVALID, WHERE SUBJECT TO APPROVAL OF NON-OFFICIAL BODY.** Where an ordinance, which provides that every building of a certain class shall be equipped with a fire sprinkler equipment, makes the installation of such equipment subject to the approval of a non-official body, the requirement in regard to such approval is invalid.
 7. **SAME—WHETHER ENTIRE ORDINANCE INVALID.** Where an ordinance is entire, and each part has a general influence over the rest, and one part of it is void, the entire ordinance is void. The void part of the ordinance makes the whole ordinance void if the void and valid parts are so connected as to be essential to each other. If the invalid part can be separated from the other provisions of the law, and the purpose and intent of the legislature remains plain and effective, the invalid part may be disregarded.
 8. **SAME.** The provision in the ordinance requiring the approval of the non-official body may be disregarded without impairing in any degree the purpose or usefulness of the law.
 9. **CAUSA PROXIMA NON REMOTA SPECTATUR.** It is elementary that to establish liability for the doing of an unlawful act, the wrong must be the direct and proximate cause of the injury.
 10. **SAME—MANSLAUGHTER—VIOLATION OF ORDINANCE OR STATUTE.** The mere violation of an ordinance or statute whereby death ensues does not of itself subject the wrongdoer to punishment for manslaughter.
 11. **MANSLAUGHTER—COMMISSION OF UNLAWFUL ACT.** A person cannot be held liable for the crime of manslaughter merely because at the time of the killing he was engaged in an unlawful act, unless the unlawful act or omission was in its nature wrongful independent of statutory enactment, or unless the natural consequences of the unlawful act or omission are dangerous to life or limb, or the act is *malum in se*.
 12. **PROXIMATE CAUSE OF DEATH—FAILURE TO SUPPLY FIRE-ESCAPES.** Where an ordinance providing that theaters shall be supplied

with fire apparatus and equipment is not complied with, and a fire breaks out and death is caused, the failure to comply with such ordinance is the proximate cause of the death.

13. NEGLIGENCE—VIOLATION OF ORDINANCE. The violation of an ordinance is *prima facie* evidence of negligence.

14. MANSLAUGHTER—DUE CAUTION AND CIRCUMSPECTION—QUESTION FOR JURY. It is a question for the jury to determine whether the defendants used due caution and circumspection in failing to equip a theater with fire apparatus and equipment as required by law, whereby death is caused.

Indictment for manslaughter. Motion of defendant to quash. Heard before Judge Marcus A. Kavanagh.

Statement of facts.

The defendant was the manager of the Iroquois Theatre in Chicago, and president and director of the Iroquois Theater Company. On December 30, 1903, a fire broke out upon the stage of the theatre among the scenery, and 600 persons who were witnessing a performance were suffocated and burned. The defendant was indicted for manslaughter, for failure to properly equip said theatre with fire apparatus, etc. The indictment contained six counts. Counts 1, 2, 3 and 4 are based on an alleged non-compliance with certain ordinances of the city of Chicago. Counts 5 and 6 are based upon an alleged common-law duty.

Count one alleges that on December 30, 1903, there were certain ordinances of the city of Chicago, defining and prescribing the fire limits of the city, classifying the buildings therein, and requiring buildings of Class V to have a flue pipe over the stage, with a switch operating the dampers of the same, and a system of automatic sprinklers, to be supplied with water from a tank above the roof, and portable fire extinguishers, axes and hooks, upon the stage; that buildings of Class V should employ an expert fireman; that the owners, lessees and managers of every such building should cause a diagram of the building to be printed on programs; and providing a penalty for a violation of the provisions of the ordinance.

That the Iroquois Theatre was planned, constructed and

built, and operated and used for the purpose of giving theatrical performances, spectacles and plays, and contained on the stage in said building movable and stationary scenery; that the building also contained a large auditorium and assembly hall, with seats, and a ticket office, where tickets were sold for compensation; that the said building was one of Class V, and within the fire limits as prescribed by the ordinances; that Davis was president and managing director of the Iroquois Theatre Company, and general manager of the building for and on behalf of the Iroquois Theatre Company, and in absolute management and control of the building with full power and authority to open, close, manage, direct and do all other things, and that he as such president, director and manager of the Iroquois Theatre Company, and general manager of the building was producing, permitting to be produced, having produced and causing to be produced a play entitled "Mr. Bluebeard, Jr.;" that he invited the public to enter the building and witness the play, for compensation; that movable and stationary scenery, electric lights, combustible draperies, etc., were used in producing the play; that there was among the scenery, etc., a *fire* which spread rapidly because of the combustible scenery, etc., and produced smoke, heat, gas and flame; that the laws and ordinances aforesaid required certain apparatus, equipment, appliances, etc., and it was the duty of Davis as president, director and general manager of said corporation, and as general manager of the building and theatre to so equip the building, and Davis as such officer was authorized and empowered to thus equip the building, and he undertook so to do; that as Davis well knew, there was not over said stage a flue pipe, extending not less than 15 feet above the roof, and not a flue pipe having an area not less than one-thirtieth of the area of the stage, and not flue dampers, and not a switch, etc., and not a system of automatic sprinklers supplied with water from a tank located not less than twenty feet above the building, and not sprinklers above and below the stage, and not on stage or in fly galleries or any place in the building portable extinguishers, hand fire pumps, fire department axes and not fire-hooks on each tier of floor of stage

or building; and that Davis did negligently fail and omit to have in and about said building or theatre or on the stage the matters aforesaid required by the laws and ordinances of Chicago. That one Viva R. Jackson was among the persons assembled in said theatre to witness said play, etc., and that on December 30, 1903, Davis, while being, and as the president, director and general manager of the Iroquois Theatre Company, and the manager of the said building and theatre for and on behalf of said company, and as manager of said stage and building and theatre, and in possession and management and control of said theatre, building and stage, did unlawfully, negligently and feloniously and without due caution and circumspection make an assault, in and upon said Jackson while within said theatre and witnessing the play; that the fire could have been extinguished, etc., had there been fire extinguishers, fire pumps, automatic sprinklers, fire hooks and axes in the theatre as required by the ordinances, and by reason of the lack of these, the fire was not and could not be put out; that by reason of the lack of flue dampers and switches, etc., the fire was not and could not be confined to the stage, and by reason of the lack of sprinklers and tank the fire was not and could not be extinguished, nor could the smoke, flame, etc., go off through the roof over the stage, and that Davis by not providing the things aforesaid as required by the ordinances did unlawfully, negligently and feloniously cause a large amount of fire, heat, smoke, gas and flame to issue, pour and go over the stage and over, against and upon the persons assembled in the theatre, and by reason of the smoke, etc., so issued and thrown over and upon her, the said Jackson was mortally burned and asphyxiated, suffocated, strangled and choked and did die on December 30, 1903, which was then and there caused by the negligence of Davis in not seeing that there were provided the things required by the ordinance and that by then and there not using due caution and circumspection while being engaged in his lawful business as aforesaid, and that Davis did negligently, unlawfully and feloniously kill and slay said Jackson contrary to the statute and against the peace and dignity, etc.

The second count is substantially similar to the first count and is predicated on the same ordinances. Davis is charged as president, director and manager of said corporation and as manager and agent of said building and theatre.

The third count is also similar, except that Davis is charged as owner and occupant of the theatre.

The fourth count alleges that on December 30, 1903, in Chicago, etc., a certain building called the Iroquois Theatre was opened and used for the purpose of producing a theatrical performance, spectacle and play designated as "Mr. Bluebeard, Jr.;" that said building had been planned, constructed and erected for the purpose of producing and giving therein and in the Iroquois Theatre located in said building, certain theatrical performances, etc., and that in said Iroquois Theatre in said building there was a stage erected for the purpose of therein producing plays, etc., the plays, etc., aforesaid; that there was in said building a large number of seats for the seating of persons there congregated to witness the aforesaid theatrical performance, and that there was in said building a ticket office where tickets were sold for compensation to persons to attend the certain performance aforesaid, and that said building was used as an assembly hall for large gatherings of people, and that there was in said building and on said stage movable scenery, which was used for producing the play aforesaid; that said building and theatre was situated within and in the fire limits of the city of Chicago, and was a building of class five within said ordinances, hereinafter set forth. That Davis was engaged in a certain lawful business and act, the business and act of managing generally said building and said Iroquois Theatre therein, and was the general manager of said building; that there was a law and ordinance of said city, duly passed, adopted and promulgated by the city council and mayor which was a valid law prescribing and defining the fire limits of said city, which ordinance is set out in the indictment.

That Davis as manager of said building and theatre was empowered, authorized and invested by the owners of said building to procure and furnish the apparatus, etc., required by

said laws and ordinances; that Davis as general manager of said building did undertake and assume the duty to furnish, supply and equip said building, theatre and stage with the apparatus, etc., required by said laws and ordinances; that Davis as the general manager of said building and theatre was empowered, authorized and directed to open and close said theatre and to provide the things required by said ordinances; that there was not then and there the things required by said ordinances.

That Davis was in charge, management and control of said building for and on behalf of the owner thereof, and had taken upon himself the care, charge, management and control of said building and theatre and the duty of providing the things required by said ordinances; that it was the duty of Davis to use due caution and circumspection for the safety of the persons and lives of the persons there congregated, and to have about said building the things required as aforesaid; that one Jackson was one of the persons assembled therein to witness said performance; that a certain lighted arc lamp being operated on the south side of the stage during the progress of the play aforesaid, was put, placed and kept near a certain drapery on the stage, by reason of which the drapery was ignited, and which fire could have been easily extinguished if there had been in said building and on said stage the appliances, etc., required by said ordinances, and fire extinguishers, and hand pumps; that by reason of the lack of extinguishers and pumps, as aforesaid, and the apparatus required by the ordinances, said fire was not and could not be put out; that by reason of the fire being in said drapery and a large amount of combustible material and scenery being on said stage, as Davis well knew, and being ignited, causing a large amount of fire, smoke, heat, gas and flame to be upon, etc., said stage and that by reason of the lack of flue, dampers and switches the fire, etc. did not and could not go through the roof of said stage, and could not be and was not confined to the stage, and by reason of lack of sprinklers and tank required by ordinances, the fire, heat and flame on the stage could not be put out, and the grand jurors present that

had there been flue, dampers and switches, as aforesaid, a large amount of fire, etc., could and would have gone through the roof over the stage, and could and would have been confined to the stage; and if there had been sprinkler and tank as aforesaid the flames, etc., could have been extinguished and put out by the same; that by reason of lack of appliances required by ordinances, the fire, etc., was not thrown off through the roof over said stage and was not put out and was not confined to said stage.

That Davis by his negligence in not providing and in not seeing provided the appliances, etc., required by ordinances, and by being engaged in his lawful business and act without the due caution and circumspection which was his duty then to use, did unlawfully, negligently and feloniously cause fire, smoke, heat, gas and flame to issue, pour and go from said stage to, towards, against and upon the persons assembled, and upon said Jackson who was then and there mortally burned, etc. and did die; that said death was caused by said negligence of Davis in not providing and seeing provided the apparatus, appliances and things aforesaid for the protection of the life of said Jackson, and by his not using due caution and circumspection, while engaged in his lawful business and act. And so Davis did slay, and kill, etc., contrary to the statute, etc.

Count five alleges that on December 30, 1903, the Iroquois Theatre Company, a corporation, was the owner and occupant of a certain building and theatre before then created, constructed and built by the corporation; that there was a large amount of movable scenery on the stage and a large amount of curtains, etc., used in the production of plays, a large number of "lights," and appliances and equipments of combustible material; that a certain play was being produced during which production there was used, changed, raised, lowered, etc., the said lights, scenery, etc.; that a large number of persons were assembled in said theatre; that Davis was then and there "the president and director and general manager" and the "general manager" of said building on behalf of the corporation; that Davis was "in care, possession, management and control of said building and theatre" for and on behalf

of said corporation; that Davis had before then been "president, general manager and director" of said company at and during the period of construction, etc., and was in control and management of its erection, equipment, etc., for said corporation; that said theatre was not wholly completed and equipped; that Davis opened said building and theatre as a public place of amusement, etc., and invited the public to enter for compensation to witness the production, etc.; that Davis was producing, causing and permitting to be produced and given the said play, etc.; that Davis was empowered and authorized by said corporation to provide for the safety of the lives of said spectators; that Davis on behalf of said corporation undertook to provide for their safety; that it was the duty of Davis to use "due caution and circumspection" for the safety, etc., and to provide a safe place for the persons assembled; that one Jackson was present witnessing said play at the invitation of Davis; that it was the duty of Davis to use due caution and circumspection to provide for the safety of the life and person of the said Jackson and to provide a safe place to witness said play; that because of the large amount of movable scenery, drapery, lights and wires, and of the changing of the same, there was imminent danger of fire by reason of the likelihood of the scenery, etc., being brought in contact with said lights and being ignited by the same, all of which Davis knew or ought to have known; that it was Davis' duty to use due caution and circumspection to provide against fire and to use due caution and circumspection in providing equipment, appliances and apparatus for the purpose of extinguishing any fire which might occur and which was then and there probable; that it was the duty of Davis to use a high degree of care in providing apparatus, appliances and equipment and things to then and there extinguish any fire which might occur; that there was not then and there sufficient apparatus, etc., with which to extinguish or put out a fire which Davis knew; that Davis while so having the care, charge, management and control, upon said Jackson, while witnessing said play, did unlawfully, negligently, feloniously and without due caution and circumspection make an assault, and that a certain light was brought

in contact with a certain drapery which became ignited; that said fire could have been easily extinguished and put out had there been in said building, theatre and stage any fire apparatus, appliances, equipment or things provided for that purpose, but that by reason of the absence and the lack of any such apparatus, appliances, equipment or things, said fire was not and could not be extinguished and put out, and that by reason of said fire the scenery, etc., ignited, which Davis knew was probable in case of a fire; that by reason of said fire a large amount of smoke, etc., was caused to be around said stage, etc.; that by reason of the absence of any apparatus, etc., the said fire, etc., was not extinguished, and could not be confined to said stage, as could have been done had such apparatus, etc., been provided; that said Davis by his negligence in not providing and in not seeing that the said apparatus, etc., was not in said theatre, etc., and by being engaged in the said business and act of so managing, running and operating said building, etc., without due caution, etc., as it was his duty, did unlawfully, etc., cause a large amount of smoke, etc., to pour from said stage upon the said Jackson, and by reason thereof death was caused; that said death was caused by the neglect of Davis by not providing for and not seeing that there was provided the necessary apparatus, etc., for the protection of Jackson against death by fire and by his not using due caution, etc., for the safety of the life, etc., of the said Jackson; that the said Davis did negligently, feloniously and unlawfully kill and slay contrary to the statute.

The sixth count is substantially similar to the fifth count.

A motion to quash the indictment was made, and the motion was overruled as to the first four counts and sustained as to counts five and six.

John J. Healy, state's attorney, and *E. C. Lindley*, assistant state's attorney, for the people.

Levy Mayer, for defendant.

KAVANAGH, J.:—

The defendant moves to quash severally the six counts of an indictment against him in each of which is charged the statu-

tory crimes of manslaughter. The first four of these counts are bottomed upon a fire ordinance of the city of Chicago, which prescribes certain fire limits and regulates the kinds of buildings to be therein erected and the manner of their use. For convenience of reference the buildings within the fire limits are divided into classes, as follows:

CLASS I. In this class shall be included all buildings devoted to the sale, storage or manufacture of merchandise, and all stables over 500 square feet area.

CLASS II. This class shall embrace all buildings used as residences for three or more families, all hotels, all boarding or lodging houses occupied by twenty-five or more persons, and all office buildings.

CLASS III. This class shall embrace all buildings used as residences for one or two families or for less than twenty-five persons, and stables under 500 square feet area.

CLASSES IV and V. These shall include all buildings used as assembly halls for large gatherings of people, whether for purposes of worship, instruction or entertainment.

Buildings of Class IV embrace all buildings in which no movable scenery is used upon the stage thereof. Class V embraces all buildings in which movable scenery is used.

In this controversy we are only concerned with Classes IV and V. Concerning these two classes the ordinance further provides:

“There shall be over the stage of every building of Class V a flue pipe of sheet metal construction, extending not less than fifteen (15) feet above the highest part of the roof over the stage of said building—flue shall have an area of at least one-thirtieth of the total area of the stage. The dampers for flue shall be made of metal and opened by a close circuit battery; a switch to be placed in the ticket office and one placed near the electrician’s station on the stage, each to have a sign and these words printed on it: ‘Move switch to left in case of fire to get smoke out of building’ (sec. 184).

“In every building of Class V a system of automatic sprinklers to be supplied with water from a tank located not less than twenty feet above the highest part of roof of build-

ing. Sprinklers shall be placed above and below the stage; also in paint room, store room, property room and dressing rooms, if they are in or connected with Class V building, and not separated by approved double iron doors. Tank not to be connected to stand pipe and ladder systems, but to have separate pipe for filling from fire pump, and a 3-inch pipe extending from tank to outside of building, with siamese connections for fire department use. The entire sprinkler equipment to be approved by the commissioner of buildings, fire marshal and the board of underwriters of Chicago (sec. 185).

“In buildings of Class V and also of Class IV where stationary scenery is used, there shall always be kept for use portable fire extinguishers or hand fire pumps, on and under the stage; in fly gallery and in rigging loft, also at least four (4) fire department axes, two twenty-five (25) feet hooks, two (2) fifteen feet hooks, two (2) ten (10) feet hooks, on each tier or floor of the stage, all subject to the approval of the fire marshal (sec. 188).

“Every portion of any building of Class IV and V devoted to the uses or accommodation of the public, also all outlets leading to the streets, and including the open courts and corridors, stairways and exits shall be well and properly lighted during every performance, and the same shall remain lighted until the entire audience has left the premises (sec. 192).

“It shall be the duty of the owner, lessee or manager of every building of Classes IV and V during the performance of which programs are issued, to cause a diagram showing the exits of such building to be printed on such programs (sec. 186).

“Any person, firm, company or corporation who violates, disobeys, omits, neglects or refuses to comply with, or who resists or opposes the execution of any of the provisions of this ordinance, shall be subject to a fine of not less than \$25 nor more than \$200; and every such person, firm, company or corporation shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue, and shall be subject to the penalty

imposed by this section for each and every separate offense; and any builder or contractor who shall construct any building in violation of any of the provisions of this ordinance, and any architect designing or having charge of such building who shall permit it to be so constructed, shall be liable to the penalties provided and imposed by this section'' (sec. 216).

The indictment then charges that there was a certain building and theatre known as the Iroquois Theatre used then and there for the purpose of producing theatrical performances, to which the public were invited and for which an admission was charged; and that there was in this theatre movable scenery, and that there was at the same time stationary scenery, thus bringing the building within Classes IV and V; that there were also a large number of curtains, draperies and borders and drops upon the stage of the theatre in close proximity to a great number of lights, thus creating a danger of fire.

The indictment charges that the building was owned and in the possession of the Iroquois Theatre Company, a corporation, and that the defendant, William J. Davis, was president of the company, and the managing director thereof, and also the general manager of the building and theatre for this company; again it is charged that he himself was the owner of the building; that he was in absolute management and control of the building and theatre with full power to open, close, manage, direct and do all other things with the said building as he then and there might determine; and that he for the corporation was producing and permitting to be produced on behalf of the corporation a certain play; and that on the 30th day of December, 1903, there was assembled to witness this play a great number of persons, to-wit: eighteen hundred in response to the invitation of said William J. Davis, and that there occurred a fire in this theatre which produced a large amount of smoke and heat and gas and flame; and that it was the duty of the said William J. Davis to use due caution and circumspection in equipping, providing and supplying the building with equipment and apparatus required by the ordinances of the city of Chicago.

The indictment further charges that the defendant failed in this duty in that he neglected to provide, first, the flue pipe and its equipment, as above described; second, automatic sprinklers and their accessories, as called for in the ordinance, and third, the portable extinguishers or fire pumps and the other hand apparatus required by the ordinance.

The indictment goes on to declare that one Viva R. Jackson was in the audience so assembled and that by reason of this failure upon the part of the said William J. Davis, Viva R. Jackson was suffocated and burned to death, and that if William J. Davis had fulfilled the requirements of the ordinance as above set forth, that the life of Viva R. Jackson would have been saved, the fire would have been extinguished and the gas and flame and the smoke would have escaped through the roof of said building.

The second, third and fourth counts of the indictment substantially follow the first count; the only material difference so far as the discussion of this question is concerned being in the relations borne by the defendant to the theatre and to the Iroquois Company.

He is charged in the second count in addition to the other relations set forth in the first count, with being the agent of the building and theatre. He is charged in the third count with being the owner and occupant of the building and theatre, and in the fourth count with managing generally the building of the Iroquois Theatre.

The fifth and sixth counts, called in argument for convenience of description common-law counts, charge the defendant with being the president, director and general manager of the Iroquois Theatre Company and general manager of the building; that he was in the possession, management and control of the building. It charged that Davis was producing a play in the theatre and that it was then and there his duty to use due caution and circumspection for the safety of the audience; that because of the large amount of movable scenery, drapery, lights and wire and of the changing of the same there was imminent danger of fire by reason of the likelihood of the scenery and materials being brought into contact with

the lights and being ignited, all of which Davis knew or should have known; and that there was not then and there sufficient apparatus to extinguish or put out a fire, a failure which the defendant knew, and that he failed to furnish such apparatus, and by reason of such failure Viva R. Jackson was killed.

These last counts proceed solely upon the theory that it was the duty of the defendant to provide, irrespective of the ordinance, fire escapes and apparatus for the putting out of a fire. For the purposes of expediency in presentation we may dispose of the objections to these last two counts at this time.

The supreme court of Illinois in the case of *Landgraf v. Kuh*, 188 Ill. 484, says: "The duty of providing fire-escapes did not exist at common law, but has its origin and measure in the statute, requiring that such fire-escapes be placed upon buildings."

In *Arms v. Ayer*, 192 Ill. 601, our court says: "It is equally well settled that at common law there was no liability imposed upon the owner of a building to provide fire-escapes or other means of exit in case of fire, as a general rule, and that for this reason, as well as because of the penal character of the act, it must be strictly construed."

Outside of our own state there seems a practical uniformity of decision upon the question. Opinions to the same effect are found in *Pauley v. S. G. L. Co.*, 131 N. Y. 90, 29 N. E. 999; *Huda v. American Glucose Co.*, 154 N. Y. 474, 48 N. E. 897; *Schmalzreid v. White*, 97 Tenn. 36, 36 S. W. 393; *Jones v. Granite Mills*, 126 Mass. 84; *Kecley v. O'Conner*, 106 Pa. St. 321.

In *Jones v. Granite Mills*, the court says: "The narrow question is presented whether a master is required by the common law so to construct the mill, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible. We know of no principle of law by which a person is liable in an action of tort for mere non-feasance by reason of his neglect to provide means to obviate or ameliorate

the consequences of the act of God, or mere accident, or the negligence or misconduct of one for whose acts towards the party suffering he is not responsible. * * * It is no part of the contract of employment between master and servant so to construct a building or place where the servants work that all can escape in case of fire with safety, notwithstanding the panic and confusion attending such a catastrophe. No case has been cited where an employer has been held responsible for not providing such means of escape. The construction and arrangement of manufactories and places where large numbers of persons are employed, may be proper subjects of legislative action, and such an act has been passed since this catastrophe."

It is true that at common law independent of statutory enactment, proprietors of places of amusement owe a duty to exercise reasonable care for the safety of those rightfully upon their premises, but under the above authorities that this foresight is required to extend to the erection of fire escapes and the provisions of apparatus for the extinguishment of fires, I do not think well established, and therefore the motion to quash counts five and six of the indictment are sustained.

The real difficulty presents itself when we come to consider the first four counts of the indictment.

Section 145 of the Criminal Code provides that: "Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: *Provided, always,* that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder."

The first objection made to these counts goes to the ordinance itself. It maintains that nothing contained in the sections above quoted imposes an act of duty upon any one concerned; that these sections are merely an affirmative expres-

sion of the intent and desire of the legislators, and go no further.

The defendant argues first: That where no duty is imposed by law or by contract no penalty follows its nonfulfillment. That there must be a legal obligation before there can arise a legal duty. In support of the general proposition there are many decisions. The general doctrine is well stated by Justice Field sitting in *nisi prius* in the case of *U. S. v. Knowles*, reported in the 26th Federal cases, page 800. In that case a sailor fell from the mast of his ship into the ocean and the defendant, the master of the ship, could have rescued the sailor Swainson had he stopped his ship, could have lowered either of his boats, but from his negligence and omission in this respect Swanson was drowned. The defendant was indicted for manslaughter, and Judge Field in charging the jury said:

“In the first place the duty omitted must be a plain duty by which I mean that it must be one that does not admit of any discussion as to its obligatory force; one upon which different minds must agree or will generally agree. Where doubt exists as to what conduct should be pursued in a particular case, and intelligent men differ as to the proper action to be had, the law does not impute guilt to any one, if, from omission to adopt one course instead of another, fatal consequences follow to others. The law does not enter into any consideration of the reasons governing the conduct of men in such cases to determine whether they are culpable or not.

“In the second place, the duty omitted must be one which the party is bound to perform by law or contract, and not one the performance of which depends simply upon his humanity or his sense of justice or propriety. In the absence of such obligations it is undoubtedly the moral duty of every person to extend to others assistance when in danger; to throw, for instance, a plank or rope to a drowning man, or make other efforts for his rescue; and if such efforts should be omitted by any one when they could be made without imperilling his own life, he would by his conduct draw upon himself the just cen-

sure and reproach of good men; but this is the only punishment to which he would be subjected by society."

The court further says that in case of a person falling overboard from a ship at sea there is no question as to the duty of the commander. Nothing will excuse him for an omission to take any steps necessary to save a person overboard, provided they can be taken with a due regard for the safety of the ship and others remaining on board, and any neglect to make such effort would be criminal, and if followed by the loss of the person overboard, when he might have been saved, the commander would be guilty of manslaughter.

That the duty must be a specific, personal duty, there can be no doubt. It is so laid down in all the books. Wharton's Criminal Law, sec. 110; *Rex v. Gray*, 4 F. & F. 1098; *Regina v. Pocock*, 5 Cox, C. C. 172; *U. S. v. Eaton*, 144 U. S. 677; *Belk v. The People*, 125 Ill. 584; *Commonwealth v. Watson*, 97 Mass. 562; *Hitchcock v. Chicago*, 72 Ill. App. 196; *Ex parte Railway*, 18 Lower Canada Jurist, 141; *City of Chicago v. Rumpf*, 45 Ill. 90.

Wharton says: "A light-house keeper permits his light to go out and a vessel is consequently wrecked. Is he penally responsible? Certainly so, if he is specially charged with the office of light-house keeper at that point, and if this is the kind of light on which seamen depend for guidance. But supposing a number of persons volunteer in order to warn vessels to keep lights in their windows, the omission of one of these persons to light his windows from which serious mischief ensues, would not be indictable. The same distinction may be applied to parties employed to give fire alarms."

The best illustration perhaps from a court of last resort is contained in the case of *Anderson v. State*, 27 Tex. App. 177, 11 S. W. 33. The defendants in that case were brakemen and were riding upon the engine when one Sing Morgan was struck and killed, and it was charged that if they had used a degree of care and caution in regard to giving signals or keeping lookout which an ordinarily prudent person would have used under like circumstances, the accident would not have happened.

The court says: "These appellants were brakemen; they had no control whatever of the engine and tender. They were riding upon the same for the purpose merely of performing their specific duties as brakemen, which duties had no connection with or relation to the homicide. * * * As we understand both the common law and the statute, there can be no criminal negligence or carelessness by omission to act unless it was the special duty of the party to perform the act omitted."

So in the case of *United States v. Mitchell*, 58 Fed. 993, where the defendant was indicted for refusing to answer questions put to him by the census supervisor, the court held that there was no provision in the act requiring corporations or their officers to answer the questions, and that therefore the defendant was not liable.

In *Thomas v. The People*, 2 Colo. App. 513, 31 Pac. 349, the defendant was indicted because of the caving in of an excavation in the street by reason of which accident four men were killed.

"To fasten any criminal responsibility upon Thomas (the foreman) it is indispensable to demonstrate that he omitted to do something which he ought to have done or that he did that which he should not have committed in such a grossly negligent way that the law would impute to him the criminal intent which is the essential ingredient of all crime. This cannot be done. * * *

"It was not shown either that he was negligent in the direction of the construction of the ditch nor that anything which he did with reference to that construction was negligently done and that from such negligence the accident resulted. * * * He was simply a gang boss, entrusted with the naked execution of his principal's orders and without any discretion with reference to any of the particulars of that execution. * * * When the defendant is accused because of his neglect to do a particular thing the duty must be a plain one requiring no discussion to establish its obligatory force and concerning it there must be a general consensus of opinion. It is likewise essential that the party charged must

be obligated to do what he omitted to perform by the terms of some contract by which he is bound, or the law must have cast on him the obligation of performance."

To the same effect are the following Illinois cases: *Mackey v. Milling Co.*, 210 Ill. 115; *Schueler v. Mueller*, 193 Ill. 402; *R. R. Co. v. Clausen*, 173 Ill. 100.

From these general principles the defendant proceeds to his more direct contention that before a person can be held liable for the violation of such an ordinance he must be specifically designated in the law itself as one obligated to fulfil its requirements. To illustrate: The sections of the ordinance under consideration containing the requirements which are the subject of complaint in this indictment provide "there shall be on the stage of every building" certain appliances and "in every building of Class V a system of automatic sprinklers * * * shall be placed above and below the stage," and again "in buildings of Class V and also IV there shall always be kept for use fire extinguishers, etc.," but who shall supply the automatic sprinklers or other equipment is not set forth in the ordinance, therefore it is contended that the duty not being cast upon the defendant and he being in no manner obligated in terms to provide these appliances, he cannot be made liable for their absence.

In contradistinction to the sections quoted, it is further provided that "it shall be the duty of the owner, lessee or manager * * * to cause a diagram of such building to be printed on the programs." Here it is pointed out the owner, lessee or manager is named in the section itself, a precaution which is not taken in the sections before cited.

In other words. defendant's contention is, as expressed by Judge Kohlsaas in the case of *McCulloch v. Ayer*, 96 Fed. 178: "That even if it was the intention of the legislature to impose a duty to construct, irrespective of notice by the inspector, the person upon whom it was intended to impose such duty and the resulting liabilities, was not designated in the statute with certainty and that this court should not inflict such liabilities upon any one where the duty may only be de-

terminated by inference that such person was the one "intended by the legislature to be charged with the duty."

To aid the defendant in his contention he brings citations from many authorities. Wharton on Homicide, sections 72 and 73, lays down the general proposition that "When a responsibility exclusively imposed upon the defendant is such that an omission in its performance is in the usual course of events casually followed by an injury to another person or to the state, then the defendant is indictable for such an omission. But the "responsibility must be one exclusively assumed by the defendant. The omission to perform acts of mercy even though death to another result from such omission is not within the rule."

So far no decision of a court of final resort of this country has been referred to in this opinion in which the doctrine for which the defendant contends has been applied. But in the case of *Maker v. The Slater Mill & Power Co.*, 15 Rhode Island, 112, 23 Atl. 63, the identical question here under discussion comes frankly under the observation of the court; and, as that case is directly in point and of considerable importance, I deem it advisable to consider it at length.

First, it may be necessary to understand the course of judicial decision which had preceded its determination.

In Rhode Island the history of judicial decision upon this question is properly traceable from the case of *Aldrich v. Howard*, reported in the 7th Rhode Island, page 199, and decided in 1862. This case, is cited in all the subsequent opinions of the court. The plaintiff there in an action on the case relied upon an act of the general assembly, passed in 1843, prescribing certain fire limits and prohibiting the erection or maintenance of buildings of a certain size within such limits unless they were composed of non-combustible material.

The declaration alleged that the defendant erected within the forbidden district a large wooden building prohibited by the law to be erected therein, and which structure was within two feet of the plaintiff's dwelling, thereby putting plaintiff's property in danger of destruction by fire. This it was

charged was all done in violation of the statute and the plaintiff asked damages. The law upon which he relied provided:

“Section 1. After the passing of this act no building of any kind whatever which shall be more than eighteen feet high from the ground to the highest point of the roof thereof shall be erected within the limits hereinafter described in the city of Providence, unless such building be constructed of such material and be situated in such manner as hereinafter described.” The act also declares that every person who shall erect, construct, add to or continue to use any such building shall be punished, etc.

The court in its decision construes the act as imposing upon any one erecting a building within the fire limits, a duty in regard to adjoining owners and in regard to the public—the duty of building in the manner and of the materials prescribed by the act. The prohibition is imperative upon him if he builds at all to build as the act prescribed and in no other manner; and quite as effectually imposes upon him the legal duty of so building as if the statute had expressed the duty in affirmative form.

In answer to the objection that the penalties set forth in the statute are exclusive of all other penalty the court says:

“We have no doubt that when the statute makes the doing or omitting of any act illegal and subjects the offending parties to penalties for the public wrong only, a party specially injured by the illegal act or omission has the right of suing therefor at common law.”

In 1878 the act upon which this last decision was based was amended in many material particulars and thereafter a conflagration occurred in a building owned by the Slater Milling & Power Company, in which conflagration a great many persons were injured and many suits were brought.

The first of these suits reported is the case of *Grant v. The Power Co.*, decided in 1884, contained in the 14th Rhode Island, page 380. In this case the court advances to a question nearer to the one at bar because its underlying facts are of closer kindred.

The declaration set forth that the defendant, although sub-

ject to their provisions, neglected to comply with the public laws of Rhode Island, chapter 1688, and in consequence of such neglect the plaintiff was compelled by a conflagration in the building of the defendant to leap from a window in the upper story in order to save his life; that his leg was fractured in the leap and amputation became necessary. The defendant demurred generally.

Section 23 of the new statute provided: "Every building already built or hereafter to be erected in which twenty-five or more operatives are employed in any of the stories above the second story shall be provided with proper and sufficient, strong and durable, metallic fire escapes or stairways constructed as required by this act, unless exempted therefrom by the inspector of buildings, which shall be kept in good repair by the owner of such building, and no person shall at any time place any encumbrance upon such fire escapes."

The court points out that the present statute provided not only a punishment by fine for its violation but also, unlike the former law, ordained that the supreme court might now restrain by injunction any violation of the act, and the court in deciding the case, says:

"If the remedy by fine were the only remedy given, the inference would be, as decided in *Aldrich v. Howard*, that it was intended only as punishment for the public offense and the remedy by action on the case in favor of a person specially injured, if such remedy were proper, could not be excluded. But in this respect the case at bar differs from *Aldrich v. Howard*, for in the case at bar there is the remedy by suit in equity which is not purely a public remedy."

The court also concludes that a large discretion was left by the new act to the public inspector of buildings and that "evidently the inspector of buildings was mainly relied upon to carry it into effect. The remedy by penal prosecution and the remedy in equity are clearly his only weapons."

At the following term the case of *Maker v. The Slater Mill & Power Co.*, *supra*, was decided and concerned itself with the same law and the same catastrophe with this addition, that the statutes of Rhode Island, chapter 204, provided

“That whenever any person shall suffer any injury to his person, reputation or estate by the commission of any crime, or offense, he may recover his damages for such injuries.”

Section 22 of this chapter described, however, that such action should not be commenced until after the complaint had been made to some magistrate and process issued, and the case was decided against the plaintiff for the reason that no such complaint had ever been made. The court in this case was called upon by counsel to end a long course of litigation by passing upon the validity of the ordinance itself but it declined to do so, and in declining suggested the questions which would arise in such a consideration. The question here under consideration was not then suggested by the court as being involved. It will be observed that up to this time the supreme court of Rhode Island had determined that in case of the violation of these fire laws, first, when the statute prescribed a public penalty alone, a private action resulted to one damaged; second, when the statute provided a public and a private remedy, the remedies set forth in the statute were exclusive; third, that there could be no civil proceeding under section 21 of chapter 204, unless a complaint had first been formally laid with some magistrate and it had gone no further.

But in the case of *Maker v. The Slater Mill & Power Co.*, *supra*, the plaintiff put himself within the provisions of chapter 204, and the question of the liability of the defendant under the fire statute came squarely before the court for determination, namely: the question whether “the defendant’s omission to provide its buildings with fire escapes or stairways as required by chapter 688, is a crime or offense.”

The facts were the same as in each of the two preceding cases. The court set forth upon the inquiry thus:

“But upon whom does the duty rest? When is it to be performed and what facts are necessary to constitute a violation of the duty? The plaintiff claims that the reasonable construction of the act puts the duty upon the owner. He argues that as there is an alternative between fire escapes or stairways, the duty must be upon one and the same person,

and that person the owner, because only he could provide stairways.

“We do not see that this is necessarily so. * * * The plaintiff further urges that the defendant in this case is liable because it is both the owner and the party in control.” Nor does this view find favor with the court. The court argues that it is more reasonable to assume that the act indicates that the requirement is to be discretionary with the inspector, dependent perhaps upon his judgment of danger in a particular case, or of other equivalent provisions for safety. It also indicates that the time for requiring fire escapes is when the inspector requires them.

The decision of the New York court of appeals in *Willy v. Mulledy*, 78 N. Y. 310, to the effect that the defendant in that case was not permitted to wait until he should be directed to provide a fire escape, and that he is bound to do it of his own accord in such a way as the commissioners should direct and approve, and that it was for the defendant to procure the direction and approval of the commissioners, was cited to the court, and the Rhode Island judges meet the citation by saying that under the law in that case there was no discretion in the commissioners and that there was no power of exemption, and that the owner was bound to provide fire escapes in any event. The duties of the commissioners were simply to direct and approve the kind to be used.

The court concludes: “But upon this fundamental point we think it sufficiently appears that the provisions in regard to fire escapes and stairways are too indefinite and uncertain to impose a criminal liability upon an owner of a building for not providing one or the other before the inspector required it.”

Study of the decision fails to disclose whether it was the opinion of the court that if the inspector had in fact required the erection of fire escapes the defendant would be liable; and whether as a matter of fact they hold the declaration bad because of such lack of requirement by the inspector, or whether they hold that the penalty of the statute is actually non-enforceable because the act did not specifically impose the duty upon the owner, there are no decisions referred to by the

court in its opinion, nor are there any cited in the argument of counsel.

But in the case of *Beehler v. Daniels*, 18 R. I. 563, 29 Atl. 6, the supreme court of Rhode Island placed an interpretation upon that decision and say plainly that in the *Maker* case, the terms of the act were too indefinite and uncertain to impose a criminal liability for non-compliance with the statute, and hence no action could be maintained for such alleged offense.

In addition to the two Rhode Island cases, Judge Kohlsaatt in the case of *McCulloch v. Ayer*, *supra*, Judge Green in *The People v. Davis*,¹ and Judge Landis in a recent case² have had under consideration the identical ordinance with which we are now concerned, and each has decided that because of its indefiniteness and uncertainty the ordinance imposed no duty, and its violation involved no civil liability.

It must be conceded that to sustain the indictment in this case it will be necessary for the court to rule directly against these last authorities, and, while the *Maker* case upon which the others seem to be more or less directly founded, is indecisive, and, as we have seen, almost incoherent upon this question, yet, the formidable array of opinions which follow that decision lends to it a weight which otherwise it might not possess.

Also the case of the *United States v. Mitchell*, 58 Fed. 993, must be added to this list which directly sustains the contention of the defendant in this case. If, however, the subtlety of criticism employed in this last case were to be adopted generally as a canon of construction for city ordinances and even for the statutes, it would invalidate a large number of our existing laws.

If then the doctrine announced in the *Maker* case and those cases which depend on it is found to be the law governing the case at bar, the ordinance under consideration possesses no effectiveness or force and is without life or substantial value.

Such a conclusion, however, should not be drawn if another reasonable determination can be arrived at which will uphold

¹ See I Ill. C. C. 217, *supra*.—Ed.

² *Hunter v. Iroquois Theatre Co.*, U. S. Cir. Ct. N. D. of Ill. (unreported).—Ed.

the ordinance. It is the duty of courts to uphold legislative acts whenever possible rather than to overthrow them. While penal statutes must be strictly construed so as not to include persons or acts not clearly within their terms, yet when the question arises as to whether these acts are to retain life and validity, another principle of law intervenes. *C. B. & Q. v. Jones*, 149 Ill. 361; *Hankins v. People*, 106 Ill. 628; chapter 131, Hurd's Revised Statutes, rule 1.

Even larger consideration in this regard should be given municipal ordinances than to acts of more exalted deliberative bodies. The former laws are in great part framed by persons unskilled in the law and rarely by persons skilled in the preparation of statutes. And yet this class of legislation bears with the greatest directness upon the health, the peace, the comfort and the safety of the inhabitants of municipalities. From the exigencies of the situation these laws will often of necessity be loosely drawn and at times their meaning will be imperfectly expressed. So far from burdening them with hard and restrictive theories of construction, our own court in the case of *Arms v. Ayer*, 192 Ill. 601, thus expresses the rule which obtains in Illinois and which should prevail I think everywhere.

"It must be admitted that the act is loosely drawn," the court says, "but the rule that it is the duty of courts to so construe statutes as to uphold their constitutionality and validity if it can be reasonably done, is so well established that a citation of authorities is needless. In other words, if the proper construction of a statute is doubtful, courts must resolve the doubt in favor of the validity of the law. Statutes and city ordinances providing for fire escapes are usually somewhat general in their enactments, and necessarily so, for the reason that it is impossible for the legislature to describe in detail how many fire escapes shall be provided, how they shall be constructed, and where they shall be located in order to serve the purpose of protecting the lives of occupants in view of the varied location, construction and surroundings of buildings; and hence, so far as we have been able to ascer-

tain, acts similar to the first section of this statute have been sustained in other states though perhaps the question here raised has never been directly presented."

It is true here that the sections under consideration fail to designate who shall provide the appliances for the theatre, but it must be remembered that the defendant is not charged with any default in the original construction or arrangement of the building in question. It is charged that after the building had been thus imperfectly erected and equipped that he with knowledge of these conditions took it in hand and used it as a theatre. "Any person, firm, company or corporation who violates, disobeys, omits, neglects or refuses to comply with * * * shall be subject to a fine," and again "Any builder or contractor who shall construct any building in violation of the provisions of the ordinance shall be liable." How can any person other than the builder or contractor be guilty?

In the case of the *United States v. Van Schaick*, 134 Fed. 592, heard on demurrer in the United States district court for the southern district of New York (otherwise known as the Slocum cases) it was sought to hold Van Schaick, the master of a vessel, for the loss of life consequent on the destruction of the boat, and the basis of the charge against him consisted among other derelictions in his going to sea with his vessel while the same was insufficiently equipped with life preservers and while it was equipped with life preservers which were rotten, insecure and defective. The initial duty of equipping the vessel with life preservers was placed upon the owners by the United States statutes and the master of the vessel was nowhere specifically designated by the law as a person upon whom this duty in any way devolved. Judge Thomas in an able and exhaustive opinion, among other things, says:

"While it is not the duty of the master to equip the vessel with life preservers, and while he may not be chargeable, in the first instance, with the duty of making what would be regarded as a proper inspection thereof, necessary to discover the presence or absence of the qualities and material required by law, yet it is the duty of the master of a vessel, aboard and

in command, to use ordinary observation and inquiry and if thereby, or if from report to him, he has notice of defects either in his vessel or equipment, some diligence is required on his part, tending to the restoration of the defective place or appliance. At least it would be his duty to report the condition, and make requisition for repairs or sound facilities.

“Assume that no life preservers were provided. Could the master, with actual or constructive knowledge, navigate the vessel with impunity? If he knows of some total omission of requisite equipment, itself perilous to human life may he deliberately continue to navigate its vessel, wholly indifferent to any catastrophe that may result therefrom? It is thought that such attitude on the part of the master would not be tolerated. And so, if the master blindly uses what he is proffered, however bad or destructive it may be, or constructively or actually knows of defects and does nothing, he is certainly not performing the duty of a master. It is not the duty of the master to provide the hull of the ship, yet if he navigate his vessel without any care as to the condition of the hull, or with a hole in the bottom, of which he has knowledge, actual or constructive, and she sinks, and death thereby ensues, he would, it is thought, fall within the punishment of section 5344. Much more evident would be his guilt if he caused the hole ‘to be and remain’ in the vessel. In other words, if he suffered and permitted it to be and remain in such vessel, knowing or enabled to know in the use of ordinary observation of its existence and danger, he would be guilty; and he would likewise be guilty if he caused the defective thing to be on the vessel and to remain thereon. The master’s duty requires him to exercise some care to discover both the soundness and safety of the hull and equipment.”

This reasoning seems unanswerable. Applying it to the present case and testing the situation now involved, what results? Conceding for the moment that because of the indefiniteness of the ordinance no one was charged with the duty of supplying the equipment and appliances therein described, and that no prosecution could be had for the mere ownership or inactive control of the building, what was the situation in

which the defendant found himself before he began using the theatre?

Here was a building constructed and arranged in violation of the law because the ordinance provided that "No wall, structure, building, or part thereof, will hereafter be built, constructed, altered or repaired within the fire limits of the city of Chicago, except in conformity to the provisions of this ordinance," and this building was constructed admittedly in violation of the terms of the ordinance. Also some one had offended against the law in its erection because the penalty clause provided that "any builder or contractor who shall construct any building in violation of the provisions of this ordinance shall be liable."

There, then, was a building erected in violation of the law which the defendant desired to use for the purpose of an assembly hall. Granting that there was no obligation upon him either as agent, owner, lessee or manager to arrange the theatre in conformity with the ordinance, had he no further duty in the premises? It seems to me there was a plain one, to-wit: The obligation to refrain from using it as a theatre, and if he insisted upon so using it, knowing of its unlawfully defective and dangerous condition, did he not come within the direct inhibition of the penalty clause of the ordinance which enacted, "Any person, firm, company or corporation who violates, disobeys, omits, neglects or refuses to comply with the provisions of the ordinance shall be subject to a fine?" But, pursuing the argument further, may it be fairly said that the ordinance in question is defective in its provisions?

Classes IV. and V. are thus defined in the ordinance: "These shall include all buildings used as assembly halls, etc." Suppose we simply transpose the language of the ensuing paragraph from "there shall be over the stage of every building of Class V. a flue pipe, etc.," to "there shall be no building used as an assembly hall unless there be over the stage thereof a flue pipe, etc.," would it be insisted that the indictment here did not charge an offense: that he who used the building without the flue pipe did not disobey the ordinance. The mere change from the affirmative form to the

negative form of expression would do no violence to the rules of interpretation. *Aldrich v. Howard, supra*. And yet if this is allowed the ordinance stands with its intent clearly expressed and the obligations plainly defined, a valid, enforceable law. As we have seen, it is the duty of the court to favor a construction which shall uphold the law rather than one which will take from the law its force and efficacy, and are we not then after considering all parts of the ordinance together, obliged to the conclusion that all persons were forbidden to use the building in question without complying with the requirements of the fire ordinance under pain of the punishments therein devised. And so it seems to me clearly that the weight of reason is in support of the indictment so far as this question is concerned. However, if even this reasoning be not well founded, or if it be overborne by the weight of authority brought against it, still I am convinced that the objection to the indictment is not well taken.

On two other occasions a similar question has been before our own supreme court. The first of these instances is recorded in *Landgraf v. Kuh*, 188 Ill. 484.

The case of *Landgraf v. Kuh*, was an action of trespass on the case brought against the defendants because of their failure to provide a certain building, owned by them and situated in the city of Chicago, where the deceased was engaged in work, with sufficient and proper means of egress, ladders and fire escapes, by reason of which the plaintiff's intestate was killed. There was in force at the time an act relating to fire escapes for buildings wherein it was provided, section 1, "that all buildings in this state which are four or more stories in height, except such as are used for private residences exclusively, but including flats and apartment buildings, shall be provided with one or more metallic ladder or stair fire escapes * * * the number, location, material and construction of such escapes to be subject to the approval of the * * * board of county commissioners," etc.

Section 2 of the act provided that "all buildings of the number of stories and used for the purposes set forth in section 1 of this act which shall be hereafter erected in this

state, shall upon or before their completion each be provided with fire escapes."

Section 3 provided for giving of notice by the authorities to "the owner or owners, trustees, lessee, or occupant of any building," etc., not provided with such fire escapes, commanding, "such owners, trustees, lessee or occupant of either of them, to place or cause to be placed upon such building, such fire escape or escapes" within a certain time.

Section 4 provided that any of the persons so served with notice who shall not within thirty days comply with the notice shall be subject to a fine.

It will be observed that neither section 1 nor any other section of the act in terms put a primary duty upon either owner, trustees, lessee or occupant to provide fire escapes. And it was urged there as it is claimed now, such duty could not arise from mere inference; and "the statutes of this state impose no duty upon the owner of a building to provide fire escapes. "Even conceding" the defendant said, "(which we do not) that the building was a building for manufacturing purposes then the statute does not impose a duty upon the owner of the fee but upon the owner of the factory." But the supreme court decided against all these contentions. It held that the owner of the fee is liable because of the inference arising from the fact that these appliances were to be put on when the building was completed. The court also intimates that any person to whom it is provided in the law notice may be given is liable without the notice, for the court says: "The fact that the buildings are to be provided with fire escapes 'upon or before their completion' indicates that the duty of providing such fire escapes devolves upon the owners of the buildings. The fire escapes are required to be a part of the construction of the building itself; moreover the notice commanding such fire escapes to be placed upon the building is required by section 3 to be given to 'the owners, trustees, lessee or occupant, or either of them.' The injunction being in the alternative the notice may be given to the one as well as to the other and therefore to the owner as well as to the lessee or occupant. We are therefore of the opinion that the apel-

lees were not relieved from liability in regard to the placing of fire escapes upon their building because the fourth floor of the premises, where appellant's intestate was at work at the time of her death was in the possession and under the control of the tenants or appellees instead of being directly in the possession of appellees themselves.

While in direct terms the supreme court in that case does not determine the question herein presented, yet this is accomplished by necessary implication, for the liability of the appellees under the law is sustained, nor is the liability limited to the owner of the fee by the decision, but in the opinion it is clearly foreshadowed that this liability extends to "the owner as well as the lessee or occupant."

When we come to consider this case in connection with that of *Arms v. Ayer*, 192 Ill. 601, it seems to me that all question disappears as to what the law is now on that point in this jurisdiction. The latter case was an action by an administrator for the death of her intestate resulting from injuries sustained, it was alleged, through the violation of the fire escape act, approved May 27, 1897.

That act was quite as impersonal in its creation of obligations as is the present ordinance. Section 1 of the act provided, that within three months next after the passage of this act all buildings, etc., shall be provided with metallic fire escapes "provided that all buildings more than two stories in height used for manufacturing purposes * * * shall have at least one ladder fire escape for every fifty persons and one such automatic metallic escape or other device for every twenty-five persons," etc.

It will be observed that this section contains no reference to who shall provide this apparatus or be responsible for buildings yet to be erected. Section 4 provides that it shall be the duty of said inspector of factories to serve a written notice upon the owner or owner's trustees or lessees or occupant of any building commanding him to comply with this law. Section 5 provides that in case such person so served shall not within thirty days thereafter comply with its demand he shall be punished. This law was practically, it will be noticed, the

same as the ordinance now under examination in all the features which are being criticised. The declaration was in ten counts, in four of which the statutory notice was alleged to have been given the defendants, while in the other six that allegation was wanting. The defendants were charged as owners, lessees, and with being in possession and control of the building. A demurrer was sustained to each count in the court below, and the upper court was called to examine the sufficiency of each count.

The objection being urged to the ordinance in the case at bar was then as strenuously urged to the statute. "Here then," says the appellee Ayer, upon page 51 of his argument, "is an act which imposes a new obligation, *but fails to point out with certainty on whom the obligation rests* or to prescribe the rule by which in a given case *he is to be ascertained.*" The italics are copied.

The appellant began his argument with the statement, "The principal question and perhaps the only question which your honors will consider as of any moment is, whether or not the statute in question is void because the first section does not name specifically on whom is placed the duty of putting fire escapes on buildings over four stories in height."

The appellees argued that the statute must be strictly construed. The case of *Beehler v. Daniels*, 18 Rhode Island, 563, 29 Atl. 6, evidently had not come under their observation so they construed the Maker case as deciding that the liability depended upon the service of the statutory notice. They say, "even though it is assumed that the law is capable of enforcement, no one can be held liable for non-compliance therewith, until the inspector of factories has served the notice required by the act." And they cite in support of the proposition, *Maker v. Slater, supra*, *Grant v. Slater, supra*, *McCulloch v. Ayer, supra*, *Schott v. Harvey*, 105 Pa. 222, and the other Pennsylvania cases.

The court says in its opinion: "It is said that 'Even though it is assumed that the law is capable of enforcement, no one can be held liable for the non-performance therewith, until the inspector of factories has served the notice required by

the act.' With this contention we cannot agree. It is true the first and second sections do not say who shall provide the fire escape, but we think the fair and reasonable intendment is that the owner or owners shall perform that duty and we so held in construing the fire escape act of 1885, the provisions of which in this regard are the same as the act under consideration in the recent case of *Landgraf v. Kuh*, 188 Ill. 484. The language of section 6, 'who shall be required to place one or more fire escapes upon any building or buildings under the provisions of this act,' does not mean, who shall be required by the inspector of factories, but who shall be required by the act. The duty to provide fire escapes upon buildings described in section 1 does not depend upon the performance of any duty by the inspector of factories." The court then proceeds to quote with approval from the case of *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153, and from *Willy v. Mulledy*, 78 N. Y. 310, two cases directly hostile to the position taken by the defendant in this case.

The court then continues, and it seems to me that now its language becomes conclusive upon the question before us: "When the act went into effect," it says, "it was the duty of every owner, trustee, lessee or occupant in the actual control of any building within the description mentioned in the first section in obedience to section 6, to file in the office of the inspector of factories a written application for a permit to erect or construct fire escapes, and if these defendants failed to do so, as alleged in the several counts of the declaration, and injury resulted from their failure to place the required fire escapes in the building described, they incurred a liability to the person injured and cannot escape that liability merely because they may not have been designated by the inspector of factories as the persons upon whom the duty was imposed to comply with the law. In other words, the law imposed upon them the performance of the duty and the action of the inspector of factories * * * is only made necessary in case they failed to do that duty. It has been held that the term 'owner' in similar statutes does not mean the owner of the fee but may mean the lessee in actual possession and control of

the building; but we are not aware that any court has held such laws invalid because of their failure to definitely designate who should be liable. We think it clear that under this statute the owner is primarily liable for a failure to perform this duty." Thus it must be considered that the supreme court of our own state, in passing upon a statute strikingly similar to the one set forth in this indictment holds that the mere omission to specifically designate the person upon whom the duty of furnishing the appliances and requirements devolves, does not render the statute inoperative but that under the statute then in question that duty devolved at once upon the owner and without the notice provided for in the statute, and that a civil liability for failure to comply extended to the lessee, trustee or occupants in the actual control of any building within the description mentioned in the first section of the statute.

This conclusion finds substantial support in the following decisions outside of our own state. *Willy v. Mulledy*, 78 N. Y. 310; *Rose v. King*, 49 Ohio St. 213, 30 N. E. 267; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068; *Hayes v. Michigan Cent. R. R.*, 111 U. S. 228.

It is next objected, and many authorities are brought to the attention of the court on the proposition that the ordinance is invalid because it requires the approval of a non-official body. It is provided in one section of the ordinance that "The entire sprinkler equipment to be approved by the commissioner of buildings, fire marshal, and the board of underwriters of Chicago." There can be no doubt but what the requirement in regard to the board of underwriters is void, and it is claimed that this provision affects the whole ordinance and renders it void.

Also it has been often decided that "where an ordinance is entire, and each part has a general influence over the rest, and one part of it is void, the entire ordinance is void. The void part of the ordinance makes the whole ordinance void, if the void and valid parts are so connected as to be essential to each other." *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 21.

But if the invalid part can be separated from the other provisions of the law and the purpose and intent of the legislature remains plain and effective, then the invalid part may be altogether disregarded. *C. B. & Q. R. R. v. Jones, supra*. It does not seem to me that this provision requiring the approval of the board of underwriters is at all necessary to the meaning or effectiveness of the ordinance and that it may be omitted without impairing in any degree the purpose or usefulness of the law. Therefore, this provision may be disregarded and the law considered as if this requirement had never been, leaving only the sound parts of the statute intact.

It is elementary that even if an injury may follow the commission of a wrongful act, still if the wrong be not the direct and proximate cause of the injury itself, that no liability results to the wrong-doer. *Causa proxima non remota spectatur*, is the maxim. And in this case it is strenuously argued that the fire and not the lack of saving appliances, was the direct and proximate cause of the death of Viva R. Jackson.

Many authorities are cited in support of that contention. Thus in a Kentucky case a tenant was sued for removing water pipes from the leased building, it being charged that because of such removal it became impossible to extinguish a fire which afterwards occurred. But the court said:

"It seems to us that to make the appellees liable for the destruction of this building there must be some proof showing that the act of disconnecting and removing the pipes was the cause of the destruction of the building: and as this removal had been done some time and no fire had happened, and in the absence of proof that if the pipes had been in perfect order, the engine and pumps would have worked * * * and that all that having been done it would of necessity have saved the building, the damage is entirely too problematical and speculative to permit a recovery. The acts of negligence complained of are too remote." *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. 1; *Franke v. Head*, 19 Ky. L. Rep. 1128, 42 S. W. 913.

In *Stone v. Boston R. R.*, a teamster not connected with the defendant dropped a lighted match underneath the defendant's freight platform. The platform was loaded with oil

which, contrary to law, had been standing there for more than forty-eight hours. In the conflagration which ensued plaintiff's buildings situated across the way were destroyed. It was held in an action for the loss of the buildings that the fire and not the illegal storing of the oil on the defendant's platform was the proximate cause of the destruction of plaintiff's buildings. And in deciding the cause the court says:

"The rule is very often stated that in law the proximate and not the remote cause is to be regarded; and, in applying this rule it is sometimes said that the law will not look back from the injurious consequences beyond the last sufficient cause. * * * It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrong doer. Many instances to the contrary have occurred and these are usually cases where it has been found that it was the duty of the original wrong-doer to anticipate and provide against such intervention because such intervention was a thing likely to happen in the ordinary course of events."

These two cases out of the multitude offered sufficiently illustrate the claim of the defendant, but it seems to me that the supreme court of this state has in *Landgraf v. Kuh, supra*, determined also the question. The court says:

"It is further claimed on the part of appellees, that the absence of a fire-escape, if it was a cause of the injury which resulted in the death of the appellant's deceased, was only the remote, and not the proximate cause of such injury. It is said, that appellant can not fasten any liability upon the appellees, unless she not only shows omission by appellees of a duty, but unless she also shows that such omission of duty was the direct and proximate cause of the accident complained of. It is often difficult to determine whether the cause of an injury is the remote or the proximate cause thereof. Where, in the absence of a fire-escape, a person in a burning building is destroyed by the flames, it is unquestionably true that the fire is the proximate cause of the death, but yet it cannot be said that the absence of the fire-escape is not, in the view of the law, a proximate cause, if the presence of such fire-escape

would have prevented the death. So, if a person in a burning building where there is no fire-escape or non-accessible, is forced to seek escape from the building by descent from a ladder or otherwise, it may be a question whether the defective condition of the ladder, or its unskillful use, is, in such a case, so far the proximate cause of the accident as to make the absence of the fire-escape merely a remote cause. Certainly, the effort to escape in some other mode than by a fire-escape might be directly caused by the absence of such fire-escape. But we do not wish to be understood as expressing any opinion upon the question, whether the obstruction of the double window communicating with the fire-escape, or an accident in connection with the use of the fireman's ladder, was the proximate cause of the death of appellant's intestate, or not. What we decide is, that the question, what is the proximate cause of an injury, is ordinarily a question to be determined by the jury under the instructions of the court. In *Fent v. Toledo, Peoria & Warsaw Railway Co.*, 59 Ill. 349, we said (p. 362): 'We understand * * * the position of counsel for appellee to be that, if fire is communicated from a locomotive to the house of A. and thence to the house of B. it is a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate cause of the injury to B.; and the railway company is, for this reason alone, to be held not responsible. This rule we repudiate as in the teeth of almost numberless decisions, and as unsupported by that reason which is the life of the law. We hold, on the contrary, * * * that it is in each case a question of fact, to be determined by the jury under the instructions of the court. * * * If the fire is the consequence of the carelessness of the railway company, and the question of remote or proximate cause is raised, the jury should be instructed that, so far as the case turns upon that issue the company is to be held responsible, if the loss is a natural consequence of its alleged carelessness which might have been foreseen by any reasonable person, but is not to be held responsible for injuries which could not have been foreseen or expected as the results of its negligence or misconduct.' In *Milwaukee, etc.*,

Railway Co. v. Kellogg, 94 U. S. 474, it was said: 'The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it.' (*Ford v. Illinois Refrigerating Co.*, 40 Ill. App. 222).''

The defendant is accused of involuntary manslaughter, that is, the killing of a human being, in the commission of an unlawful act, or a lawful act done without due caution or circumspection. The crime is further defined by the statute as the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such consequences in an unlawful manner.

Now, it must be conceded at once that the mere violation of a city ordinance or even of a statute notwithstanding death ensues during the violation and in connection therewith, does not of itself render the law-breaker liable to punishment for manslaughter.

In *Commonwealth v. Adams*, 114 Mass. 323, one who while violating a city ordinance against fast driving, drives over another, is not guilty of criminal assault and battery merely because of his violation of the ordinance.

In *Potter v. State*, 162 Ind. 213, 70 N. E. 129, the defendant at the time of the homicide was unlawfully carrying a pistol in violation of the statute. During a friendly scuffle the pistol was accidentally discharged and a person was killed, and the court says that, "It is undoubtedly true as a general rule of law that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily result or flow from such unlawful act. But before this principle of law can have any application under the facts in the case at bar, it must appear that the homicide was the necessary or natural result of the act of appellant in carrying the revolver in violation of the statute.

* * * The mere fact that the accused was unlawfully carrying the weapon in question at the time it was accidentally discharged is not under the circumstances a material element

in the case, for it is manifest that such unlawful act did not during the scuffle between the parties render the pistol any more liable to be discharged than though the carrying thereof had been lawful."

Again, the court says in its opinion: "It is not charged in the indictment in this case that the homicide resulted from the reckless, careless or negligent manner in which appellant was using or handling the pistol at the time it was discharged. Consequently under the pleading, even though the facts could be said to justify or sustain such a charge, the case is not brought within the rule of culpable negligence as affirmed, and enforced in *State v. Dorsey, supra*, where the defendant was charged in the indictment with having carelessly and negligently run a locomotive engine into a passenger car, thereby killing a person who was a passenger thereon."

Nor would the mere fact that a person unlawfully attempted to pass through a toll-gate without paying his toll, and while so doing caused the death of another, render the offender guilty of manslaughter. Such act done in the exercise of due care is at worst *malum prohibitum*, in itself devoid of dangerous tendency, and therefore not criminal. But it was said that "if the unlawful act were done under conditions dangerous to the toll-keeper; as, if he drove through the gate at a rapid pace, or urged his team of mules on after they had been seized by the deceased, or if from their known fractiousness it was dangerous to stop them—the criminality consisting of two elements, the unlawfulness of the act and the unlawfulness and danger in the mode of its execution," the defendant would be criminally liable. *Estell v. State*, 51 N. J. L. 182, 17 Atl. 118.

However, in the case of *The People v. Pearne*, 118 Cal. 154, 50 Pac. 376, the supreme court of that state held that in a case charging fast driving in violation of an ordinance by reason of which driving a person was killed, that the ordinance did not strengthen the case of the people, but left the case just where it stood before, upon the actual occurrences, as to whether the act was done with "due caution and circumspection." Nevertheless the law upon this question seems reason-

ably clear from the authorities, and it may be thus summarized:

The defendant can only be held liable criminally for the consequences, not intended of an unlawful act: First, when the act or omission is in its nature a wrongful act independently of the enactment, such as breaches of public order injurious to person or property, outrages upon public decency or good morals, and the like. Or, second, when the natural consequences of the unlawful act or omission are dangerous to life or limb, which last clause may after all be included within the term *malum in se*.

Suppose, however, that the act complained of here was not *malum in se*, then was it in its natural consequences dangerous to life?

It must be remembered both in the consideration of this question and the consideration of the question of proximate cause that the ordinance supposes always a fire to have happened before its provisions will be of avail. The persons for whose benefit the law was enacted are always in danger and the apparatus and appliances mentioned in the ordinance are commanded to be supplied them in their then situation, to relieve them of their peril.

Does it require more than the mere statement of this feature of the law in question to establish that the natural consequences of an omission to perform its commands will be fraught with danger to life and limb? If, as stated in the Potter case, "a person engaged in an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow or result from such unlawful act; is not the person charged with the duty of supplying fire escapes responsible for the injury caused to persons by reason of his failure to supply them?

Contending for the sake of the argument even that the ordinance in question has not the dignity or force of a public law but, it placed a positive duty upon the shoulders of the defendant which is as high at least in character as the duty created by contract, and the natural and probable result of a failure to perform that duty, it must be assumed, as we have seen, for the purposes was a danger to life. And it

would seem incontrovertible that the wrong-doer is responsible for such omission.

But if this conclusion be wrong, then there is another consideration which disposes of the objection: Though a violation of the ordinance in question in the manner charged, may not constitute an unlawful act within the meaning of the statute even though its natural consequences were dangerous, yet there can be no question but what the omission makes *prima facie* a case of negligence.

It has been held repeatedly by the supreme and appellate courts, that a failure to observe a statutory precaution, or one created by municipal ordinances, raises a *prima facie* case of negligence.

In the recent case of the *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, our supreme court says: "The violation of a statute is *prima facie* evidence of negligence. This is also true as to the violation of a city ordinance where the ordinance is such a one as the city is authorized by its charter, or by statute, to make. The ordinance when passed by a power conferred by statute, has the force and effect of the statute. (*Morse v. Sweenie*, 15 Ill. App. 486; *Penn. Co. v. Frana*, 13 Id. 91, and authorities cited). * * * Inasmuch, therefore, as the city council of Chicago had the power to pass the ordinance, set up in the additional count, and introduced in evidence in the case at bar, such ordinance has the force and effect of a statute."

The court then cites in support of its position *Channon v. Hahn*, 189 Ill. 28; *True & True Co. v. Woda*, 201 Ill. 315, and many other authorities.

Then if it is assumed that this omission to supply the apparatus and appliances described in the indictment was negligent, who is to say whether this negligence failed of the due caution and circumspection required by law? Surely not the court, in the face of the charges made in this indictment. The indictment charges in each count that upon the stage there were a great many lights and draperies, borders and curtains and that the latter were highly combustible and inflammable and that if the equipment called for by the ordinance had been provided, Viva R. Jackson would have been saved.

So it seems to me that under the charges of the indictment all of which are admitted to be true, that in the view most favorable to the defendant there is a question for a jury to pass upon, and that it is conclusively established that it is for a jury to determine whether his omission to provide the equipment constituted a lack of due caution and circumspection within the meaning of the statute.

There are several minor objections presented against the indictment which I do not deem important. On the whole the indictment seems to me to present a state of facts which if true at least raises a charge triable by a jury. The motion to quash is overruled as to the first, second, third and fourth counts, and is sustained as to the fifth and sixth counts.

With the truth or falsity of the charges, with the manifest difficulty of proof, this opinion, of course, has nothing to do; for the purposes of this motion, all the charges in the indictment are admitted to be true. I have arrived at these conclusions with diffidence and after great labor, realizing fully as I do the seriousness of the cause both to the people and to the defendant, the difficulty of the questions presented and the high authority of the courts from the opinions of which I have been obliged to differ.

The great industry and ability of counsel engaged, combined with the intense interest they have taken in the controversy have lightened the labors of the court and greatly facilitated his research.

(Circuit Court of Cook County. In Chancery.)

Sperry, et al.

vs.

Stinson.¹

(May 21, 1895.)

1. **TAXES—RIGHT OF MORTGAGEE TO PAY.** Taxes and assessments are a paramount lien to all others, and a mortgage lien holder, even in the absence of covenant, has the right to pay and discharge such taxes and assessments where the mortgagor fails to do so.

¹ Judgment reversed, 174 Ill. 125.

2. **SAME—RIGHT TO REDEEM.** A mortgage lien holder may redeem from tax sales and buy up tax certificates and tax titles after the time for redemption had expired, paying a reasonable consideration therefor. The amount so paid, with interest, can be recovered in the foreclosure proceedings.
3. **MORTGAGEE AS PURCHASER AT TAX SALE—RIGHTS OF.** There is nothing in the mortgage contract which prevents the mortgagee from purchasing the premises at a tax sale. But neither the mortgagor or the mortgagee are allowed to obtain any advantage, the one over the other, by reason of any such purchase, nor will such purchase be allowed to ripen into an adverse title as against the other party, or those in privity with him.
4. **SAME—SEVEN YEARS' PAYMENT OF TAXES.** Nor can payment of taxes by the mortgagee or the mortgagor in possession be relied upon as payment of taxes under color of title under the seven-year Limitation Act.
5. **SAME—PAYMENT OF TAXES BY MORTGAGEE.** The mortgagee has the right to pay taxes and add the amount thereof to the mortgage debt. A purchase at a tax sale is not a payment of taxes, nor is the purchase of a tax certificate a payment of taxes or a redemption.
6. **SAME—RIGHTS OF MORTGAGEE HOLDING TAX CERTIFICATE.** Where a mortgagee becomes a purchaser at a tax sale he is in the position of any other purchaser with all the incidents and obligations imposed by the statute.
7. **TAXES—PAYMENT OF BY TAX PURCHASER IN SUCCEEDING YEARS.** If a mortgagee holding a tax certificate fails to pay the next year's taxes and the property is sold, the mortgagor has the right to redeem from the first sale by paying only the amount for which the land was sold.
8. **SAME—RIGHTS OF MORTGAGORS.** Where a mortgagee purchases a tax certificate the mortgagor has the right of election, whether the mortgagee shall be considered as a purchaser or as holding the tax certificate for the benefit of the mortgagor.
9. **TAXES—SALE OF VIGINTILLIONTH INTEREST.** The sale of a vigintillionth of certain land for the non-payment of taxes is not a cloud upon the title, and a mortgagee redeeming from such a sale cannot charge the amount so paid against the mortgagor. The maxim, *de minimus non curat lex*, applies.
10. **TAX SALES.** The rule of *caveat emptor* is applicable to tax sales.
11. **TENDER.** To stop the running of interest in case of a tender, the tender should be kept good by paying the money into court.

Exceptions to Masters' report. Heard before Judge Murray F. Tuley.

For statement of facts see opinion.

Price & Stewart, for complainants.

Prentice & Whitman, for defendants.

TULEY, J.:—

The Connecticut Mutual Life Insurance Company held a bond and trust deed security, by way of mortgage made by defendant, Stinson, to Sperry *et al.*, as trustee, to secure a debt of about \$15,000. In the trust deed the defendant, Stinson, covenanted to pay the debt at a time therein named, and that “also until full payment as aforesaid will pay all taxes, assessments and other charges; * * * also at once to repay all advances (which are also to be included in the sums hereby secured) made for taxes, assessments, rates, redemption from sales for taxes, assessments, or in any way otherwise to protect the security hereby given with interest thereon at eight per centum per annum.”

In 1893, Stinson, the mortgagor, failed to pay certain special assessments, levied upon the ten acres of land mortgaged, and the premises were sold for one assessment on November 4, 1893, of \$572.85, and on November 14, 1893, for another assessment of \$686.81.

They were bid in, and a tax certificate issued to one William Mills, who was a clerk and acted for D. J. Hamilton, a tax buyer. On the 9th of December, 1893, the two certificates were transferred to the complainant, indorsed in blank in consideration of the face of the certificates and twenty-five per centum additional, making a total sum of \$1,574.37, and on December 26, 1893, this bill was filed to foreclose the mortgage or trust deed security. Answer having been filed and issue joined, a reference was had to the master to take and state an account of the amount due upon the mortgage. While the matter was pending before the master on an accounting the premises were again offered for sale for taxes, and the east one vigintillionth of the premises sold on October 24, 1894, for \$603.33. The purchase was made by the same party, and on the 28th of November, 1894, the certificate issued thereon was transferred in blank to complainant for \$754.16, being the

face of the certificate and twenty-five per centum additional penalty.

These tax certificates were produced by complainant upon the accounting, and allowed against the defendant for the amount paid by complainant to the tax buyer, together with interest at eight per centum per annum from the time of such payment. The defendant objected to the master allowing complainant the \$1,574.37 paid on the first sale, and produced a certificate of redemption of the county clerk, dated November 16, 1894, showing that the defendant had deposited in redemption from such sale the amount of the sale without any penalty, and which, by the revenue law of this state, is declared to be a sufficient redemption in a case where the land is permitted by the tax buyer or the party holding the certificate to be again sold within two years. The evidence taken before the master disclosed the fact that the mortgagee had an arrangement with the tax buyer, by which the latter was to bid in all the property in which the mortgagee was interested, a list of the same being furnished, and the mortgagee was to take the tax certificates from the tax buyer by paying the amount paid at the sale with the accrued penalties; the tax buyer was also to be guaranteed from loss by reason of any such purchase. This arrangement was unknown to the mortgagor.

On the 6th day of December, upon the hearing before the master, the defendant tendered to the attorney of the mortgagee, the sum of \$16,972.75 in full of all claims under the mortgage. It is not claimed that if the amounts paid by the mortgagee for tax certificates in 1893 and 1894 are excluded from the computation, that the tender made at that time was not sufficient, so that upon the exceptions the only questions are, as to the right of the mortgagee to be allowed for moneys claimed by him to have been paid for the certificates of purchase, and as to the effect of the tender.

Taxes and assessments are a paramount lien to all others, and a mortgage lien holder independent of any covenants in the mortgage has the right, the mortgagor failing to do so, to pay and discharge such taxes and assessments. He may also

redeem from tax sales and buy up tax certificates after the time for redemption has expired, and also tax titles, paying therefor a reasonable consideration. The amount so paid with interest can be recovered in the foreclosure proceedings. *Jones, Mortgages*, sec. 358; *Wright v. Langley*, 36 Ill. 381; *Pratt v. Pratt*, 96 Ill. 184; *Windett v. Union Mut. Life Ins. Co.*, 144 U. S. 581.

Upon an examination of the foregoing cited authorities it will be seen that as to the questions involved, the express covenants of the mortgagor give no additional power to the mortgagee beyond what it would have had, had no such covenants existed.

There can be no question but that a mortgagee may, if he choose so to do, become the purchaser of the mortgaged premises at a tax sale. There is nothing in the mortgage contract which raises an express trust relation between the parties, trust relations being only implied under certain circumstances by a court of equity in order to carry out the real contract between the parties. And a purchase by a mortgagee at a tax sale as against all the world, except the mortgagor and those in privity with him, may ripen into a paramount title and cut off all other interests. But the mortgagor and the mortgagee, as to their dealings with each other, or with the mortgaged property, the law requires, that the same should be open and fair and in good faith; neither the mortgagor nor the mortgagee will be allowed to obtain any advantage, the one over the other by reason of any purchase at a sale of the mortgaged premises for taxes, nor will such purchase be allowed to ripen into an adverse title as against the other party, or those in privity with him. *Moore v. Tiltman*, 44 Ill. 367; *McAlpine v. Zitzer*, 119 Ill. 273.

Nor can payment of taxes by the mortgagee or the mortgagor in possession be relied upon as payment of taxes under color of title under our seven years limitation act. *Chickering v. Failes*, 26 Ill. 508; *McAlpine v. Zitzer*, 119 Ill. 273.

The mortgagee in this case could have pursued a plain and straightforward course by paying the taxes and have added the sum, together with eight per centum interest to his mort-

gage debt, or he could have redeemed from any tax sale. He might, under the arrangement made with the tax buyer, be considered the actual purchaser, for equity regards the substance, not the form of the transaction, but a purchase at a tax sale is not a payment of the taxes, nor is the purchase of a tax certificate either a payment of taxes, or a redemption. Whether the mortgagee is to be regarded as a purchaser at the tax sale, or as the assignee in blank of the tax certificates he occupied the position of a tax purchaser with all its incidents and obligations imposed by the statute concerning sales for taxes.

The mortgagee holding the tax certificates was bound to pay the next year's taxes, but failing to do so, and the property being again sold for taxes, the statute gave the mortgagor the right to redeem from the first sale by paying only the amount for which the land was sold. The mortgagor in so doing exercises only a statutory right, and there is nothing in the mortgage relation or in the provisions of the mortgage which would prevent his doing so.

If the mortgagee chose to occupy the position of a tax sale purchaser, or the holder of tax sale certificates, indorsed in blank, which could be transferred at any moment to an innocent purchaser, he can not complain if the mortgagor exercises his legal right and makes redemption under the statute. It was as easy to the mortgagee to have exercised the plain right given him by the mortgage of paying these taxes as for him to become a purchaser directly or indirectly. See *Williams v. Townsend*, 31 N. Y. 411; *Maxfield v. Willey*, 46 Mich. 252, 9 N. W. 271; *Jones v. Wells*, 31 Mich. 170.

The evidence shows that the mortgagee took up the tax certificate from the tax purchaser after being notified by the mortgagor not to do so, but as has been said as to the other two certificates, whether he is to be treated as a purchaser at the tax sale, or as a purchaser of the tax certificates after the sale, is immaterial as in either case, he occupies the position of a tax purchaser and with all the rights of a tax purchaser, and all the incidents attaching to the purchase. The right to say whether he shall be considered as purchasing or holding the

tax certificate for the benefit of the mortgagor, is a personal right of the mortgagor. *Jones v. Wells*, 31 Mich. 170; *Maxfield v. Willey*, 46 Mich. 252, 9 N. W. 271.

The mortgagor not objecting, the mortgagee may, as tax purchaser, obtain a paramount title, certainly as against all parties who do not claim by or under the mortgagor. The mortgagor has the right to say to the mortgagee on his becoming a tax purchaser, "You have chosen in place of paying the tax, or redeeming from the tax sale, to occupy the position of holder of a tax certificate, and I make no objection thereto; whether your purchase shall be considered as made for my benefit is my personal right, and I do not desire to claim it."

The contention of the mortgagee is, that the vigintillionth certificate was purchased in order to remove a cloud upon the property, and that by the express language of the mortgage, the mortgagee has a right to advance moneys necessary to remove clouds upon the title. But was this any cloud upon the title to the mortgaged premises, which it was necessary for the mortgagee to remove? It would seem clear that if ejectment would not lie for a vigintillionth of this land, that it would not be considered a cloud. In ejectment the thing sought to be recovered must be visible, a tangible something, which, in early times, would be capable of livery of seizin, and upon which an entry could be made; something capable of physical possession, and of which the owner could be dis-seized, and of which possession can be delivered by the sheriff to the plaintiff. Tyler on Ejectment and Adverse Possession, p. 37; Sedgwick & Wait, Trial of Title to Land, sec. 97.

The mind is scarcely capable of comprehending what an east vigintillionth of a ten acre tract of land would be. It certainly would not be visible to the naked eye; it would not be equal to a line drawn by the finest pointed needle ever made. Its width would be a line so fine that the most powerful magnifying glass ever made could not discover it; it would be utterly incapable of physical possession. A writ commanding the sheriff to put a tax title buyer in possession of a vigintillionth off the east side of this tract of land, would not only be incapable of execution, but would be an absurdity

upon its face. The law does not regard infinitesimals, and the maxim—*de minimis non curat lex* would be applicable in any case where this vigintillionth was involved.

A vigintillionth: 1-1,000th.

No principle can be discovered upon which the doctrine of subrogation can be applied in this case.

The rule of *caveat emptor*, let the purchaser beware, is peculiarly applicable to buyers at tax sales. Having made his contract, what right has he because it is a bad bargain, to ask to be subrogated to the lien of the state as to the whole land for the amount of taxes paid? The court knows of no principle of equity which would entitle him to any relief from his contract.

If one having a chattel mortgage upon a thousand barrels of flour, finds it levied on and advertised for sale on a prior judgment against the mortgagor, say for \$1,000, attends the sale, and because of foolish competition, bids on one barrel of flour the thousand dollars due on the judgment, what right of equity would there be in his claiming to be subrogated to the judgment creditor's lien against the other 999 barrels of flour, which was discharged by the sale of the one barrel. A court of equity would say to him, as must be said to the mortgagee in this case: "You must stand the consequences of your own improvidence or folly." The defendant's exceptions as to the allowance by the master of the amounts paid for the three certificates of purchase must be sustained.

The defendant's exceptions as to the three assessments and tax certificates being sustained, it follows that the tender made by the defendant on the hearing before the master was sufficient, but, in order to stop the running of interest, the tender should have been kept good by paying the money into court. The only effect that can be given the tender will be to charge the complainant with all the costs accruing subsequent to the tender.

Counsel may be able to agree as to amount of such costs; if not, the court will determine.

Let an order be prepared in accordance with this opinion,

but let it provide that complainant have leave to withdraw the tax certificates.

NOTE.—In *Petty v. Beers* (Appellate Court, 1st District, 1906), it was held that a deed purporting to convey one vigintillionth part of a tract of land is a nullity, and conveys no title.

(Circuit Court of Cook County. In Chancery.)

Franz Fahrig

vs.

Milwaukee & Chicago Breweries (Limited), et al.

(March 1, 1905.)

1. CORPORATIONS—RIGHT OF STOCKHOLDER TO EXAMINE BOOKS OF SUBSIDIARY CORPORATION. Where an English corporation owns the entire stock of an American corporation, and does no other business of any kind except to own such stock, a stockholder in the English corporation is entitled to examine the books of the American corporation, and is not obliged to resort to the English courts for relief.
2. SAME—RIGHT OF ENGLISH COMPANY TO OWN ENTIRE STOCK OF AMERICAN CORPORATION. Whether it is lawful for an English company to own the entire stock of an American corporation, *quære*.
3. SAME—LACHES. But where a stockholder takes no action to protect his rights for over four years, and no sufficient reason appears why he did not do so, he is guilty of laches.

Demurrer to amended bill. Gen. No. 194,198. Heard before Judge Murray F. Tuley.

For statement of facts see *Fahrig v. Milwaukee & Chicago Breweries*, 113 Ill. App. 525, a decision upon a previous appeal.

C. W. Greenfield and *Nicholas Micheles*, for complainant.

S. H. Strawn of *Winston, Payne & Strawn* and *H. T. Gilbert*, for defendants.

TULEY, J. (orally):—

Gentlemen, this is an anomalous case, treading on unknown ground and raising new questions as to the jurisdiction and powers of a court of equity.

Here is a corporation, organized in London, England, for the sole and simple purpose, and carried on for the sole and simple purpose of holding the stock of a United States corporation. It does no business itself, it carries on no business; it simply holds the stock of the American Company. It gets reports from the American Company and takes action on those reports and that is all that it does.

The substance of the whole transaction is the business carried on by the American corporation; the English corporation is a mere shadow. It is a book-keeping corporation and that only, not a business corporation.

Certificates are issued which show that the stockholders are entitled to shares of stock in the American corporation. This complainant does not get that—

MR. STRAWN: I beg your Honor's pardon, I think that certificate means the English corporation's stock.

THE COURT: And that share of stock in the English corporation represents a share of stock in the American corporation. He is entitled to a share of stock in the English corporation representing a share of stock in the American corporation.

He applies to the English corporation for an examination of the books. They respond, "why, all the books pertaining to your interests are the books of the American corporation. We haven't got them; they are in America. We can not let you examine them; we have no authority to let you examine them." Then he applies to the American corporation and they say, "Why, we can't let you examine the books, we are responsible to the English corporation alone."

Great frauds are alleged in the carrying on of the American corporation; the expenditure of millions of money wrongfully and fraudulently. What remedy has the holder of a share of stock in this English corporation? The property is in this country, the book-keeping part is in England and that is all there is of it. Is he to go to England and prosecute a suit there, or is he to attack the substance in this country, and prosecute it here? That is the question presented. Equity regards the substance, not the form of a transaction.

The substance of this transaction is an association of brewers, carried on by this American corporation. This stockholder will never get a dollar, except he gets it through the workings of the American association.

Why should he be driven to England to fight a book-keeping corporation? The property is in this country. It may not be against public policy that an English corporation should hold the entire stock of an American corporation, but I am rather inclined to think it is. I will not pass on that question. But there must be a remedy here for the English stockholder, and I see no other way except for him to pursue his remedy (if any he has) against the American corporation. When he obtains it, why, the American corporation can make its report as usual to the English corporation; there is nothing to prevent that, and that is all they want.

MR. STRAWN: Didn't he take it with notice that he was a stockholder in the English corporation?

THE COURT: He takes it with notice that he is a stockholder in an English corporation that owns the stock of an American corporation, and that represents his stock. He takes it with notice that the English corporation is a mere book-keeper of the transaction and that the substance is in this country.

The difficulty I find is that there are insufficient allegations in this bill as to the time that this stockholder obtained notice of these different fraudulent transactions; it is not clearly set forth. Time is an important matter here, and the time is a considerable length of time, some nine years or four years at least in which he took no action, and no sufficient reason appears, if he had notice, why he did not proceed to act.

I think you will have to amend your bill and set out some further excuse for the apparent laches in pursuing your remedy. I do not feel disposed to drive this party out of court if he has a right to come in, and to send him over to England to litigate there against a shadow, when the substance is in this country.

Demurrer sustained, and leave to file amended bill.

NOTE.—A second amended bill was thereafter filed on April 1, 1905.

(Circuit Court of Cook County. In Chancery.)

Vanderpoel, et al.

VS.

The West and South Towns Street Railway Company.¹

(March, 1894.)

1. **STREET RAILROADS—FRONTAGE CONSENTS.** Under the act of March 30, 1887, it is necessary to the validity of a grant of the city council to a street railroad of the right to use the streets that the petition upon which the council acts shows the consent of a majority of the owners of all private property in each mile and any fraction thereof petitioning for the construction of the road, if the petition shows such majority the action of the city council cannot be attacked except for fraud.
2. **INJUNCTION—CONSTRUCTION OF RAILROAD.** A property owner cannot maintain a bill to restrain the construction of a railway track in a public street. The injury is to the public and a private individual cannot file a bill on behalf of the public.
3. **SAME—UNAUTHORIZED CONSTRUCTION.** Even though the railroad is being laid without valid municipal authority or ordinance, a property owner cannot maintain a bill for an injunction. It must be left to the municipal authorities to remedy the wrong.
4. **SAME—EFFECT OF FRONTAGE LAW.** The frontage law was intended, however, to provide a remedy for the property owner where there is an unauthorized invasion of a street by a railroad company.
5. **SAME—MAJORITY CONSENT.** But this remedy cannot be availed of where the majority of the frontage of the mile in which the complainant's property is located petitions for the laying of the railroad. This is true even though the ordinance is otherwise invalid.
6. **DAMAGES—BOND.** Where the question is solely one of damages, or the right of complainant is not clear, the court may deny an injunction and require the defendant to give bond to secure the complainant against loss or damage.
7. **FRONTAGE CONSENTS—PROPERTY OF STEAM RAILROAD NOT CONSIDERED.** In determining whether a majority of the abutting owners have consented to the laying of a street railroad, the frontage occupied by a steam railroad abutting on such street should

¹ The above case was cited with approval in the following cases: *Tibbetts v. Railway Company*, 54 Ill. App. 188; *Stewart v. Railway Company*, 58 Ill. App. 461, 462.

not be taken into consideration in determining the total frontage, as steam railroads are considered as public highways.

8. **MOTIVE OF COMPLAINANTS.** The court will consider the motives of complainants where there is evidence that the litigation is not being prosecuted in good faith and for the protection of complainants' rights, and the complainants withhold information which would enable the court to pass upon the charge. Under such circumstances where complainants' rights are otherwise doubtful, an injunction will be denied.¹
9. **LACHES.** A bill will not lie to restrain the construction of a street railway where the complainant delayed until a considerable portion of such railway had been constructed.
10. **SAME—KNOWLEDGE OF ORDINANCE.** Such laches is not excused because the complainant did not know of the invalidity of the ordinance. The complainant is chargeable with notice of any defects, in the petition of the property owners, the proceedings of the city council, or the city ordinance, which are apparent on the face thereof.

Motion to dissolve injunction. Heard before Judge Murray F. Tuley.

For statement of facts see opinion.

W. P. Black, C. D. F. Smith and Thomas A. Moran, for complainants.

Peck, Miller & Starr, for West and South Town Street Railway Co.

William S. Johnson, assistant corporation counsel, for city of Chicago.

TULEY, J.:—

Motion to dissolve injunction upon the defendant giving bond and security to pay all damages sustained by the complainants.

On the 8th of February, 1892, the city council of Chicago passed an ordinance granting the corporation known as the West and South Towns Street Railway Company a right to construct a single or double track railway in West Twenty-second street for a distance of about five miles. The company entered upon the construction of its road, and at the

¹ See also *Taylor v. Pullman Company*, 1 Ill. C. C. 24, and note.—Ed.

time of the filing of this bill had constructed about five miles of track. The charter of the city of Chicago was amended by the act of March 30, 1887, and provides that the city council shall have no power to grant the right to lay down any railroad tracks in any street of the city to any steam, dummy, electric, cable, horse or other railroad company except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes, and when the street or part thereof sought to be used shall be more than one mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and of the fraction of a mile, if any, in excess of the whole miles, measuring from the initial point named in such petition of such street or of the part thereof sought to be used for railroad purposes.

One of the complainants owned 100 feet of frontage and the other 75, upon West Twenty-second street, and filed this bill for an injunction against the construction of the road. The injunction was recommended upon hearing before the master and has been twice before this court and the action of the master sustained. There is much new evidence produced on this motion on the part of the defendant, and the case is presented in a different aspect from what it heretofore has been.

The ordinance of the city council is attacked, as illegal, upon the ground, among others, that the city council did not have, prior to the passage of the ordinance, a petition for the occupation of the street by the railroad company signed by the owners of land representing more than one-half of the frontage of each mile, and of the fraction of a mile, of said Twenty-second street, measuring from the initial point named in the petition upon which the council professed to act, and attacks particularly the frontage of the mile in which complainant's property is situated and commencing with the west line of May street, that mile being the second mile of the line of road under the city ordinance as passed. The evidence

tends to show that in the first mile counting from the initial point, to-wit: Portland avenue named in the petition which was before the council, there was upon the face of the petition a shortage of several hundred feet.

In the second mile, the initial point being Portland avenue, there was on the face of the petition a shortage, unless in counting the frontage about 2,700 feet on the north side of Twenty-second street occupied by the Chicago, Burlington and Quincy railroad with its tracks should be excluded. In the remainder of the route there was on the face of the petition an apparent majority of the frontage signed for each mile. The ordinance as actually passed by the council, made Grove street about 1,100 feet west of Portland avenue the starting point.

With Grove street as the initial or starting point there was a shortage on the face of the petition in the first mile, and as to the second mile on which complainant's property is situated, there was also a shortage on the face of the petition, but excluding the 2,700 feet and treating the engine lot of 35 feet belonging to the city, as being private property, there was a majority of a few feet of frontage in that mile in favor of the railroad. It is insisted by the defendant that the city council was to judge of the sufficiency of the petition, and it having found that there was a sufficient frontage signed, its action is conclusive upon all persons.

I am clearly of the opinion that it is absolutely necessary to give validity to the grant of the city council to the railroad company that the petitions upon which the council acts must show a majority of all private property in each mile and fraction thereof petitioning for the construction of the railroad. If a petition on its face shows such majority, the decision of the council as to the frontage and its ordinance granting the franchise, cannot be attacked except for fraud.

It would be competent to show forgery or unauthorized signature to the petition, or other fraud tending to vitiate the petition and all action had thereon. Whether a bill for an injunction in such case would be the proper proceeding it is not necessary to decide. But, admitting this ordinance might

be held invalid for the want of a sufficient petition, or for fraud in connection therewith, in a proper proceeding by the proper party, there is a farther question in his question, which is: Can these petitioners maintain this bill for an injunction?

The control of the streets and alleys of the city is vested in the city council for the public interest and also it is the council's duty to protect owners of lots fronting on the streets and alleys in the enjoyment of their rights, incident to such frontage, but if the council fail in this duty, under what circumstances can such frontage owners have a standing in a court of equity for an injunction to protect them against an unauthorized invasion of the streets by the railroad company? A lot owner cannot file a bill on behalf of the public; such a bill must be brought by the city or the attorney-general. And could he before the passage of this frontage law, file such a bill on his behalf?

The Moses case in the 21st Illinois (*Moses v. P. F. W. & C. R. Co.*, 21 Ill. 516), and the Stetson case in the 75th Illinois (*Stetson v. C. & E. R. Co.*, 75 Ill. 74) are leading cases to the effect that no property owner can maintain a bill for an injunction as to the laying of a railroad track in a street where the same is authorized by the state and municipal authorities. The theory of the decisions being that the railroad is only an additional method of using the public streets, and that the injury to the property owner is only such as is suffered by the public at large; in other words, that he sustains no special damage, and therefore cannot bring a bill for an injunction. *Chicago v. Union B. Association*, 102 Ill. 379; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135.

If, however, the railroad is being laid without valid municipal authority or ordinance, could a property owner maintain a bill for an injunction before the passage of the frontage law referred to?

Patterson v. C., D. & V. R. R., 75 Ill. 588, is a decision to the effect that he could not, but that where there has been an unauthorized invasion of the street under a pretended ordinance, it must be left to the municipal authorities to remedy the wrong, and that the private owners cannot maintain an

injunction therefor, but must be left to their remedy at law. The frontage law, however, was intended to give the property owner some protection and some standing in court for an unauthorized invasion of a street by a railroad company.

It limits the power of the city to act, and declares in effect that there shall be no railroad laid down in the street if the property owners owning the majority of the frontage in any one mile or fraction thereof, shall refuse to petition therefor. It recognizes a right in the street appurtenant and incident to the ownership of property fronting the street, but what of the extent of that right?

The question here is: Has a property owner any right to object if the majority of the frontage of the mile in which his property is located petitions for the laying of the railroad, or, in other words, can he in such case sustain a bill for an injunction, even though the ordinance passed by the council may be invalid? I apprehend not. So far as he is concerned, when the majority of his mile petitions, he stands just where he did before the passage of the frontage act, and that is on the authority of the Patterson case, without the right to ask in his own suit the aid of an injunction. *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561.

The motion here is that the defendant be allowed to give bond to secure complainants in their damages.

I understand it to be a common practice to take such bonds in cases where there is only the question of damages, and in all cases where the laying of the railroad tracks is unauthorized, and the right of the complainant to maintain his bill is clear and beyond the question the court will not balance the damages, or the convenience and inconvenience of the parties as to granting or withholding an injunction, but if the right of the complainant is not clear the court may do so. The protection of private property and private interests against unauthorized encroachment is absolutely necessary for the maintenance of civilized society, and no one is more tenacious of doing so than I am.

But in this case I have grave doubts as to the right of the complainants to maintain this bill for an injunction. This

doubt arises upon the question whether the 2,700 feet of frontage occupied by the Chicago, Burlington and Quincy Railroad (on this motion for the first time brought to the notice of the court) should be considered as mutual property, like street intersections, and not counted in making up the amount of private frontage on the street. The design of the law was to protect private property, and excluding this 2,700 feet, there was a clear majority of the frontage (counting from the initial point named in the petition) in the mile in which complainant's property is situated, petitioning for this railroad to be laid in the street. If there was such a majority, I am of the opinion that complainants have no standing for an injunction.

The constitution declares all steam railroads to be public highways. We have then 2,700 feet of a railroad adjoining the street highway. The object and intent of the frontage law was not to protect one railroad against another and competing one. It is said, however, that the Chicago, Burlington and Quincy right of way is only a public highway for railroad purposes, but it may be fenced, and no owner of adjoining property can step upon it without being guilty of a trespass. Why should then the consent of such owner be necessary as to the use of Twenty-second street, which he cannot reach without committing trespass on the Chicago, Burlington and Quincy railroad highway? The protection of property so located is not within the reason or purpose of the law, and what is not within the reason of the law, should be held to be not within the law.

There is also another consideration which has moved the court in considering the motion of the defendant, and that is, the grave doubt arising upon the evidence submitted, whether or not this bill is prosecuted in good faith, and for the protection of complainant's rights. There is also evidence tending to show that this is being prosecuted for speculative purposes.

There is an affidavit of E. F. Cullerton, to the effect that the complainant, Brundage, told him that he and the other complainants were going to see Mr. Black, the solicitor, about

putting up a bond in his case, and wished his (Cullerton's) advice; that he knew he was being used by Yerkes, an officer and stockholder in the West Chicago Street Railway Company; that he wanted to be certain that he was not going to lose anything, or his property, in the deal; that he (Cullerton) told Brundage that it would be "landed against him" (Brundage); that he had been used by Yerkes to defeat this improvement (meaning the laying of the street railway in Twenty-second street) and that "you," meaning Brundage, are a "sucker unless you get paid for it." That Brundage replied "that is what I wanted to talk to you about," that, thereupon, he (Cullerton) told Brundage to make him (Yerkes) pay \$5,000, but that probably the solicitor representing the company would "cut you down to \$2,500;" that Brundage replied, "Now, I am glad I had this talk with you, and I am going right over there and make just such arrangements as that, or else they don't use me or my property." Cullerton also swears that Brundage said his son had got him into the litigation, and that his son had been paid \$50 by a certain party to so influence his father. Brundage denies the latter allegation quite positively, but he does not attempt a specific denial of the words Cullerton swears to his having used.

He makes a denial in general terms of Cullerton's affidavit, but admits that Cullerton did suggest to him that he ought to make Yerkes pay \$5,000 for making this fight and that he, Brundage, replied, "that if Yerkes was behind the suit, he was a good man to have behind it;" that he has an impression that he, Brundage, said further, laughingly, that "if the said Yerkes was backing the suit, that he was a good man to pull, and affiant would pull him for all he was worth."

The affidavit of Charles L. Bonney alleges that when Bonney charged Yerkes with being behind the institution and prosecution of this suit, Yerkes did not deny the same, but replied: "Certainly that meets with my approval." But the affidavit of Yerkes is a full and complete denial of Bonney's affidavit. There are other affidavits to the effect that both of these complainants had stated that this suit was not

costing them a cent. They deny having so stated and allege that they are prosecuting the suit in their own interests, but with assistance rendered by other property owners. They fail to give the names of such other property owners or to give any details as to the number of such persons or the extent of their contributions.

In the face of the attack made upon the good faith of these complainants in the prosecution of this suit, and charging in substance that they are not the real parties in interest, their showing is not satisfactory. When a party seeking the aid of this court suppresses or conceals or withholds information which would enable the court to pass upon the merits of so grave a charge, he cannot complain if the court, in the exercise of its discretion, denies him the use of the prohibitive writ of injunction to protect his alleged rights. Upon the grounds that there are grave doubts as to the rights of these complainants to maintain a bill for an injunction for the reasons hereinbefore specified, and because the proof tends to show that the complainants are prosecuting this suit for other purposes than the protection of their own property rights the court will grant defendant's motion.

I wish also to state that I am inclined to the opinion that the laches of complainants in filing this bill is also a sufficient ground for the granting of this motion. They knew of the progress of this work, and laid by until nearly five miles of track was laid, about 1,100 feet of which was in the mile in which complainant's property is situated, before they filed this bill. It is true that they swear they did not know of the invalidity of the ordinance and that on a former motion to dissolve where the evidence there submitted shows defendant to be a mere trespasser, I held that such want of knowledge excused the complainant's laches. Upon reflection, however, I am now of the opinion that they must be charged with notice of informality or defects in the petition of the property owners, the proceedings of the city council and the city ordinance, which may be apparent upon the face thereof.

The city of Chicago also now comes into court and moves this court that the motion of the defendant street railway

company be granted. A bond with sufficient security will protect complainants against actual loss, and under the circumstances, I am convinced that it is the duty of this court upon the defendant railroad company entering into bond with security to be approved by the court in the sum of \$25,000 to pay the complainants and each of them all damages that they may respectively suffer by reason of the construction or operation of this railroad track, to dissolve the injunction.

An order may also be prepared to that effect, and the order may also provide for setting aside the reference to the master heretofore entered, at defendant's cost, however, the order to avoid any question as to the matter being in the control of the court. A re-reference to the master can be had hereafter if desired.

(Circuit Court of Cook County. In Chancery.)

People ex rel. Lindauer

vs.

Prendergast.

(December 15, 1888.)

1. **COUNTY COURT NOT INFERIOR COURT.** The county court as to the subject matters committed to its charge by the constitution and general assembly is not an "inferior court" in the technical sense in which that term is used.
2. **PROHIBITION AGAINST COUNTY COURT.** The county court is not such an "inferior court" as a court to which the circuit court could issue its writ of prohibition.
3. **PROHIBITION—MATTER OF DOUBT.** Where the court has any doubt whatever as to its own jurisdiction over the county court that is sufficient cause of itself for the denial of the writ of prohibition.
4. **PROHIBITION—APPEALS FROM COUNTY COURT.** The fact that the appellate court has appellate jurisdiction over the county court, while the appellate jurisdiction of the circuit court over the county court is doubtful, is a sufficient reason for refusing the writ of prohibition.

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5. PROHIBITION—EFFECT OF RIGHT OF APPEAL. In a case where the right of appeal or writ of error exists, the writ of prohibition is not a writ of right *ex debito justitiae*, but it issues *ex gratia* resting in the sound legal discretion of the court and depending upon the circumstances of each particular case.
6. PROHIBITION—WHEN WRIT ISSUES. The writ of prohibition should never issue except in a clear case of usurpation of jurisdiction, and then only in case of extreme necessity.

Petition for a writ of prohibition. Circuit court of Cook county, Gen. No. 69976. Heard before Judges Murray F. Tuley and Oliver H. Horton, *en banc*.

Statement of facts.

This is a petition filed on December 3, 1888, for a writ of prohibition directed against the Hon. Richard Prendergast, county judge of Cook county to restrain him from proceeding with the case of *In re Lindauer Bros. & Co.*, debtors in voluntary assignment, then pending before him, on the ground that as county judge he had no jurisdiction to proceed in the matters pending in the case, in view of the decisions of the appellate courts of this state in reference to the jurisdiction of the county court in such matters, and also on the ground that no appeal would lie from purely administrative orders in parceling out the estate of the assignors, and that an appeal could be taken only from final orders. The petition was verified and accompanied by a copy of the record of the proceedings of the county court. Thereupon the court granted a rule against Richard Prendergast as county judge to show cause why the writ of prohibition should not issue.

An answer to this petition was filed on December 4, 1888, setting up that the county court was not an inferior court to the circuit court, and that an appeal would lie to the appellate court from an erroneous order of the county court, and also setting up the merits of the case solely in reply to the statement of merits alleged by the answer to be wrongfully inserted in the petition on the ground that the court in this proceeding was not concerned with the merits, but solely with the question of jurisdiction.

On December 8, 1888, the plaintiffs filed a supplemental petition setting up further proceedings before the county judge.

and an answer to this supplemental petition was filed on December 11, 1888.

Moses & Newman, for petitioner.

Kraus, Mayer & Stein, for respondent.

TULEY, J.:—

The court will not attempt a review of the many authorities or any discussion of the questions involved, but will merely announce its conclusions upon some of the points which will be sufficient, however, to dispose of this litigation. The conclusions arrived at, I am authorized to state, are fully concurred in by my brother Horton, who has also heard this case argued.

First. The court is inclined to the opinion that the county court as to the subject matters committed to its charge by the constitution and the general assembly, in pursuance thereof, is not an “inferior court,” in the technical sense in which that term is used, as a court to which the circuit court could issue its writ of prohibition. See: Constitution 1870, sec. 1; art. 6; *Propst v. Meadows*, 13 Ill. 157, approved in *Barnett v. Wolf*, 70 Ill. 76, and *Bostwick v. Skinner*, 80 Ill. 147. The subject matter of the voluntary assignment made for the benefit of creditor or creditors, is one of the subject matters committed to the exclusive jurisdiction of the county court. Rev. Stat., chap. 72.

The phrase “inclined to the opinion” is used. For this court to have any doubt whatever as to its own jurisdiction over the county court in the matter at bar, is sufficient cause of itself for the court to deny the writ.

Second. The general assembly, by the act of 1887, has given the appellate court appellate jurisdiction over the county court, while the appellate jurisdiction of the circuit court over the county court is at least doubtful. I am of the opinion that in the exercise of a sound legal discretion, that fact is a sufficient reason for refusing the writ of prohibition.

Third. Even if the jurisdiction of this court to issue the writ to the county court in the case at bar was clear and un-

doubted, yet I am of the opinion that this is another good and sufficient reason why it should not issue.

Under the authorities cited, I am satisfied that in a case where there exists the right of appeal or writ of error, as here, the writ of prohibition is not a writ of right *ex debito justitiae*, but that it issues *ex gratia*, resting in the sound legal discretion of the court and depending upon the circumstances of each particular case. It should never issue except in a clear case of usurpation of jurisdiction, and then only in case of extreme necessity.

The fact that the parties involved in this controversy have voluntarily placed themselves and the property in dispute within the jurisdiction of this court (upon the chancery side thereof), and this court having ample power to protect the same against any usurpation of power or jurisdiction of the county court, if any there should be, is of itself sufficient reason, in the exercise of a sound legal discretion, to refuse the granting of the writ of prohibition. In other words,—no extreme necessity exists which would justify the issuance of the writ.

Fourth. Lastly,—this court cannot assume that on hearing all the evidence and fully investigating the facts, the county court, in the matter there depending, will hold that there has been a voluntary assignment which authorizes it to proceed to final judgment, but if it does, it is to be expected that the two courts will take such steps as may be necessary to conserve this large property for the benefit of those entitled to it, and as will prevent any conflict between the two courts. Also that some arrangement can be made by which the question of jurisdiction as between the courts (if any arises) may be determined by the supreme court of the state at the earliest possible moment.

The rule to show cause will be discharged at the costs of the relator.

(Circuit Court of Cook County. In Chancery.)

J. J. Townsend, et al.

vs.

Chicago Union Traction Company, et al.

(July 5, 1905.)

1. **JURISDICTION OF COURTS—CONFLICT BETWEEN STATE AND FEDERAL.** The pendency in a Federal court, of a creditors' bill filed by certain judgment creditors under which receivers were appointed, with authority to operate the property under the orders of the court, is not a bar to a subsequent proceeding instituted in the state court by minority stockholders, to restrain the corporation, its officers and directors, from entering into and carrying out certain contracts alleged to be *ultra vires*.
2. **SAME—RES ADJUDICATA.** Where the Federal court has decided that there is no conflict, this is not conclusive on the state court.
3. **SAME—CREDITORS' BILLS—NATURE OF.** A creditors' bill filed in a Federal court against a corporation to collect unpaid judgments, is not in the nature of a winding up proceeding and does not subject either the corporation or its stockholders to the exclusive jurisdiction of such court, in their relations with each other.
4. **RECEIVERS—WHETHER NECESSARY PARTIES TO STOCKHOLDERS' SUIT.** The receivers of a corporation are not necessary parties to a minority stockholders' suit, where the controversy relates to the voting power of certain stock held by a trustee, the legality of an election of, and the extent of the power of directors, etc.
5. **PARTIES—CESTUI QUE TRUST.** A *cestui que trust* is not a necessary party to litigation in which he is represented by the trustee.
6. **INJUNCTION—ANNULING PAST ACTS.** Where a bill is filed to restrain the doing of a certain act, the doing of which should and would have been enjoined, but for the intervening injunction of a Federal court, it is the duty of the court to issue the injunction to annul such acts, upon the dissolution of the restraining order in the Federal court.
7. **PUBLIC SERVICE CORPORATIONS—LEASE OF PROPERTY OF.** A public service corporation is without power to lease all of its property, thereby disabling itself from performing its public duties. The state or any stockholder may prevent the execution of any such lease.

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8. SAME—PUBLIC POLICY. But if the public policy or statutory law of the state permits such a corporation to execute such a lease, neither the state nor any stockholder can object.
 9. SAME—ULTRA VIRES—ESTOPPEL OF STOCKHOLDER. Where the property of the corporation is leased in violation of the charter any stockholder can enjoin the transaction even though the state could not object. Such right, however, is personal to the stockholder, and he may by his acquiescence estop himself and his successors in title from thereafter objecting.
 10. CHANGE IN CORPORATE PURPOSE—CONSENT OF STOCKHOLDERS. Unless the law or charter otherwise provides, the unanimous consent of the stockholders is required to effect a fundamental change in the corporate purposes.
 11. POWERS OF DIRECTORS—INCREASE OF CAPITAL STOCK. Where the charter provides that the capital stock may be increased and subsequently provides that all powers of the corporation are conferred on the board of directors, only the ordinary powers are referred to. The power to increase the capital stock is so fundamental a change as to require the unanimous consent of all the shareholders.
 12. CORPORATIONS—STREET RAILROADS—POWER TO LEASE. Where street railroads are permitted by express statute to lease their right of way, the fact that the charter of a street railway company and the act under which the company is organized, are silent with respect to the power to lease, does not prevent the exercise of such power.
 13. SAME—CONSENT OF STOCKHOLDERS. Unless the company was expressly empowered to lease its right of way, it could not by the mere act of its directors or even without unanimous consent of its stockholders, change its character from an operating to a leasing company.
 14. CHANGE OF CORPORATE PURPOSE—WHETHER FUNDAMENTAL. It is doubtful whether a change by a street railway company from an operating to a leasing company, is of so fundamental a character, as to require the unanimous consent of all the stockholders.
 15. LEASE OF STREET RAILWAY—CHANGE IN SAME—ESTOPPEL OF STOCKHOLDERS. Where a lease of a street railway which is not *ultra vires* in the sense that it is not void, has been acquiesced in by all of the shareholders, the shareholders are likewise estopped to question an amended lease which changes the terms of the original lease. The acquiescence of the shareholders in the original lease is not merely a consent to the terms of such lease, but also a consent that the fundamental character of the corporation should also be changed from an operating to a leasing company.

16. **POWER OF BOARD OF DIRECTORS TO LEASE PROPERTY.** Where a street railway company leases its right of way under legislative authority, the board of directors have power to make changes in such lease.
17. **BOARD OF DIRECTORS—VACANCIES—HOW FILLED.** The statute in relation to the election of directors provides that directors must be elected by the stockholders and states that "all *other* vacancies to be filled in accordance with by-laws." *Held* that inasmuch as it was the universal practice in Illinois for at least 35 years to permit vacancies in the board of directors to be filled by the other members of the board, that the court would not overthrow such a long settled practice, by holding that such vacancies must be filled by the stockholders.
18. **MAJORITY OF STOCKHOLDERS—WHAT CONSTITUTES.** The directors of a street railway company made a lease of the company's right of way, contingent upon the approval of a majority of the stockholders and provided for the calling of a special meeting of the stockholders "for the purpose of considering and voting upon the question of approving the action of the board of directors." Part of the stock, the property of the lessee, was held in trust under a deposit agreement, to secure the performance of the lease. *Held* that such deposited stock was incapable of being legally voted by the trustee, and therefore should not be taken into consideration in determining whether a majority of the outstanding stock had voted in favor of the lease.
19. **CORPORATIONS—ACQUISITION OF STOCK IN OTHER CORPORATIONS.** It is against public policy for one corporation to acquire a *majority* of the stock of another corporation for the purpose of controlling it. The holding of stock in other corporations for some purposes is not necessarily *ultra vires*.
20. **SAME—RIGHT OF LESSEE STREET RAILWAY COMPANY TO OWN SHARES OF STOCK OF LESSOR COMPANY.** It is not against the public policy of Illinois for one street railway company to hold stock in another street railway company under certain circumstances, and where a lessee company is required to make a deposit in money or securities to secure the performance of the lease, the lessee corporation had the implied power to invest its funds in the shares of stock of the lessor company, as incident to the express power of acquiring a street railroad by lease, such purchase not being made for the purpose of securing control of the lessor company.
21. **STOCKHOLDER—RIGHT OF RECORD HOLDER TO VOTE.** The corporation and the other stockholders are not concerned with the beneficial ownership in determining the right of a stockholder of record to vote.

22. **STREET RAILROADS—LEGISLATIVE POWER TO LEASE.** Under the act of 1855 (Pr. L. 1855, p. 304) railroad companies have the power to lease their entire road.
23. **SAME—LEASE TO NON-OPERATING COMPANY.** It is not essential that the lessee railroad should at the time of the lease be an operating company.
24. **SAME—RIGHT OF STOCKHOLDERS TO ATTACK LEASE.** A stockholder of a lessor street railway company has no standing to attack an amendatory lease on the ground that it was made to a non-operating company, where such stockholder had assented to the original lease.
25. **SAME—WHETHER COMPANY NON-OPERATING.** Assuming that a lease of a street railway is inoperative because made to a non-operating company, an amendatory lease made thereafter is not invalid, where the lessee company has acquired and operated certain extensions.
26. **STATUTES—REPEAL OF.** The act of 1855 which permits railroad companies to enter into operative contracts, and to borrow money, is not in conflict with, and is not repealed by, the general incorporation act of 1872, or by the act of June 9, 1897, in relation to street railroads.

Bill for injunction. Motion for preliminary injunction. Heard before Judge Julian W. Mack. Motion denied.

Moran, Mayer & Meyer, for complainants.

I.

The consent of the legislature is an indispensable prerequisite to enable a railroad company to sell or lease all, or substantially all of its corporate property, and in the absence of such authority, such a sale or lease will not only be *ultra vires*, but it will also be against public policy and therefore void, and will be enjoined at the suit of a single stockholder. *New Albany Water Works v. Louisville Banking Co.*, 122 Fed. 776 (7th C. C. A.). (Single stockholder can enjoin; whether the contract be beneficial or injurious is immaterial); *Colman v. Eastern Co. Ry. Co.*, 4 Eng. Ry. & Canal Cases, 382, 514; s. c. 16 Law Jour. (N. S.) Eq. 73 (a stockholder's bill to restrain execution of lease. Complainant's motives held immaterial. Cited in 15 Ill. 399, and 101 Ill. 286); *Chicago Union Traction Co. v. City*, 199 Ill. 484, 542; *Board*

v. Lafayette, etc. R. R., 50 Ind. 85, 108, 109 (bill by stockholder to enjoin lease); *Beman v. Rufford*, 20 Law Jour. (N. S.) Eq. 537 (stockholder's bill to enjoin twenty-one-year lease. Cited in 15 Ill. 399, 61 Ill. 422); *Thomas v. Railroad Co.*, 101 U. S. 71, 79-86 (twenty-year lease); *Pennsylvania R. R. Co. v. St. L., Alton & T. H. R. R. Co.*, 118 U. S. 290, 306-309, 313 (action on lease and guarantee); *Chicago Gas L. & C. Co. v. People's Gas L. & C. Co.*, 121 Ill. 530, 539-541, 546; *Peoria & R. I. Ry. Co. v. Coal Valley Mining Co.*, 68 Ill. 489, 491, 494; *Hays v. Ottawa, etc., R. R. Co.*, 61 Ill. 422; *Am. L. & T. Co. v. Minnesota, etc., R. R. Co.*, 157 Ill. 641, 651, 652; *Cent. Trans. Co. v. Pullman's Palace Car. Co.*, 139 U. S. 24, 40-42, 44, 45, 47-53; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 30, 34, 37; *Union Pac. Ry. Co. v. C. R. I. & P. R. R. Co.*, 163 U. S. 564, 581; *E. St. L. C. Ry. Co. v. Jarvis*, 92 Fed. 735 (7th C. C. A.); *Cent. Trust Co. v. I. & L. M. R. Co.*, 98 Fed. 666 (7th C. C. A.)

II.

A corporation has no powers not expressly granted to it by its charter or statute, and an enumeration of powers implies the exclusion of all others. *Am. L. & Tr. Co. v. Minnesota, etc., R. R. Co.*, 157 Ill. 641, 651, 652; *Thomas v. R. R. Co.*, 101 U. S. 71, 82; *Central Transp. Co. v. P. P. Car Co.*, 139 U. S. 24, 40-44, 47, 48; *New Albany Water Works v. Louisville Banking Co.*, 122 Fed. 776 (7th C. C. A.); *Colman v. Eastern Co. Ry. Co.*, 4 Eng. Ry. & Canal Cases, 382, *514; s. c. 16 Law Jour. (N. S.) Eq. 73; *Mayor v. K. & O. R. Co.*, 22 Fed. 758; *Board v. Lafayette, etc. R. R.*, 50 Ind. 85, 108 *et seq.*; *People v. Ballard*, 134 N. Y. 269, 294, 295 (cited in Glucose case, 182 Ill. 631); *Alexander v. Atlanta, etc., Co.*, 33 S. E. 866.

III.

A. The general incorporation act of Illinois does not specify the right to lease all its property, among the powers delegated to a corporation, but such power is in effect denied to the corporation. It may only sell and dispose of property

“when not required for the uses of the corporation.” Ch. 32, sec. 5, Ill. Corp. Act; *Forrester v. Boston, etc., Co.*, 55 Pac. 229 (opinion denying re-hearing; id. 353). This case strongly illustrates how strictly similar statutes must be construed; *Central Transp. Co. v. Pullman’s P. Car. Co.*, 139 U. S. 24, 47; *Am. L. & T. Co. v. Minnesota, etc., R. R. Co.*, 157 Ill 641, 651, 652; *Alexander v. Atlanta R. R. Co.*, 33 S. E. 866.

B. The act of 1855 (Priv. Laws Ill. 1855, pp. 304, 305) has no application here because the parties to the leases complained of were incorporated under the general incorporation act, which prohibits the execution of said leases. Chap. 32, secs. 5, 49, Ill. Statutes, Corp. Act.; *Board v. Lafayette, etc., R. R.*, 50 Ind. 85, 114 (holds a lease to be substantially a sale); and to the same effect are *Pennsylvania R. R. Co. v. St. L., Alton & T. H. R. R. Co.*, 118 U. S. 290, 313; *Mills v. Central R. R. Co. of N. J.*, 41 N. J. Eq. 1, 3; *Dow v. Northern R. R.*, 36 Atl. (N. H.) 510; *Cent. Transp. Co. v. Pullman’s P. Car Co.*, 139 U. S. 24, 48, 53.

C. Besides, the act of 1855 has reference only to operating companies, and not to a corporation which, like the Traction Company, neither owns nor operates any railroad. Act of 1855, *supra* (examine all three sections and title.); *Union Traction Co. v. City*, 199 Ill. 484, 510, 512, 513, 527, 537, 538, 542–545; *Union Traction Co. v. City*, 199 Ill. 579, 605; *Coler v. Tacoma Ry. & Power Co.*, 54 Atl. 413 (N. J. 1903, stockholder’s bill); *Thomas v. Railroad Co.*, 101 U. S. 71; *Central Transp. Co. v. Pullman’s P. Car Co.*, 139 U. S. 24, 49–53.

D. But if the new leases are *ultra vires* the lessee company only, then they will be void as to all parties. *Chicago Union Traction Co. v. City*, 199 Ill. 484, 543; *Cent. Transp. Co. v. Pullman’s P. Car Co.*, 139 U. S. 24, 45, 54.

IV.

A. The making of the new leases was not “among the ordinary powers” of the parties thereto, nor among the powers which the board of directors could exercise. The new leases constituted fundamental and organic corporate changes.

Nashua & L. Co. v. Boston & L. R. Co., 27 Fed. 821, 826; *Metropolitan Elev. R. R. Co. v. Manhattan Elev. R. R. Co.*, 11 Daly, 373, 468-485; *Pennsylvania R. R. Co. v. St. L., Alton & T. H. R. R. Co.*, 118 U. S. 290, 309, 313; *Cent. Transp. Co. v. Pullman's P. Car Co.*, 139 U. S. 24, 45, 47; *Oregon Ry. & Nav. Co. v. Oregonian Co.*, 130 U. S. 1, 30; *Thomas v. Railroad Co.*, 101 U. S. 71; *Coler v. Tacoma Ry. & Power Co.* (N. J. 1903), 54 Atl. 413; *Reed v. Atlantic & R. R. Co.*, 85 Fed. 692; *Stevens v. Rutland & B. R. R. Co.*, 29 Vt. 545; *Dow v. Northern R. R.* (N. H.) 36 Atl. 510 (there, statute authorized lease by vote of two-thirds of stockholders; held, single stockholder could enjoin); *Abbott v. American Hard Rubber Co.*, 33 Barb. 578 (approved in Glucose case, 182 Ill. 631, and in 134 N. Y. 269); *Board v. LaFayette, etc., R. R.*, 50 Ind. 85, 112, 113; *Martin v. Continental Passenger Ry. Co.*, 14 Phila. 10 (holds directors have no power to lease); *Hartford & N. H. R. R. v. Croswell*, 5 Hill, 383; *Cass v. Manchester I. & S. Co.*, 9 Fed. 640 (five-year lease; expediency of lease held immaterial); 1 Beach on Priv. Corporation, sec. 73; *Alexander v. Atlanta, etc. Co.*, 33 S. E. 866.

B. Even if the new leases were authorized by statute and were not *ultra vires*, they could only be legally executed with the consent of every stockholder, and a single dissenting stockholder could enjoin the act. *Board v. LaFayette, etc., R. R.* 50 Ind. 85, 110-114 (power to lease existed at time charter was taken out; bill by stockholder to enjoin lease); *March v. Railroad*, 43 N. H. 515, 525-527, 532, 533 (power to lease existed at time charter was issued; injunction granted to stockholder); *Ill. Grand Trunk R. R. v. Cook*, 29 Ill. 237 (prior power existed); *Metropolitan Elev. R. R. Co. v. Manhattan Elev. R. R. Co.*, 11 Daly, 373, 468-485 (power to lease existed when charter was taken out); *Railway Co. v. Allerton*, 18 Wall. 233 (prior power existed); *Eidman v. Bowman*, 58 Ill. 444, 446, *et seq.* (prior power existed); *Mills v. Central R. R. Co. of N. J.*, 41 N. J. Eq. 1, 3, *et seq.* (statute held to be permissive only); *Mayor v. K. & O. R. R. Co.*, 22 Fed. 758; *Stevens v. Rutland & B. R. R. Co.*, 29 Vt. 545, 547, (statute held not mandatory but permissive only; expediency and

complainant's interests held immaterial); *Dow v. Northern R. R.* (N. H.) 36 Atl. 510 (statute authorized lease on vote of two-thirds of stockholders; held, single stockholder could enjoin, and question of advantage or disadvantage is immaterial); *Stevens v. Davison*, 18 Gratt. 819 (lease there was held oppressive and a fraud in law; stockholders must approve at a stockholders' meeting); *Clearwater v. Meredith*, 1 Wall. 25 (statute held to be permissive only); *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 596; *Kean v. Johnson*, 9 N. J. Eq. 401; *Earle v. Seattle, etc., Co.*, 56 Fed. 909 (receiver appointed on stockholders' application); *Smith v. Bangs*, 15 Ill. 399, 402; *Hartford & N. H. R. R. v. Crosswell*, 5 Hill, 383; *Alexander v. Atlanta R. R. Co.*, 33 S. E. 866; *Banet v. Alton & S. R. R. Co.*, 13 Ill. 504, 511-513; 2 Beach on Private Corporations, sec. 430; 2 High on Injunction (3d ed.), sec. 1192.

C. The same rule obtains in the case of manufacturing and trading corporations where the question of public policy is absent. Although such corporations have the power to sell or lease all their property, yet the power can only be exercised with the consent of every stockholder, and a single stockholder can enjoin the exercise of such power. *Post v. Beacon Vacuum P. & E. Co.* (C. C. A.), 84 Fed. 371; *Small v. Minneapolis Electro-Matrix Co.*, 45 Minn. 264 (approved in Glucose case, 182 Ill. 631); *Abbott v. Am. Hard Rubber Co.*, 33 Barb. 578 (approved in Glucose case, 182 Ill. 631, and in 134 N. Y. 269); *Forester v. Boston, etc., Co.*, 55 Pac. 229, and opinion denying re-hearing; *id.* p. 353; *People v. Ballard*, 134 N. Y. 269, 294, 295 (cited in Glucose case, 182 Ill. 631; approves of *Abbott v. Am. Hard Rubber Co.*, 33 Barb. 578); *Byrne v. Schuyler Elec. Mfg. Co.* (Conn.), 31 Atl. 833; *Parsons v. Tacoma S. & R. Co.*, 65 Pac. 765; *Cass v. Manchester I. & S. Co.*, 9 Fed. 640; *Harding v. Am. Glucose Co.*, 182 Ill. 551, 625-633; *Elyton Land Co. v. Dowdell*, 20 So. 981.

V.

A. An *ultra vires* contract cannot be rendered valid by the assent of every stockholder or by partial performance; nor

does the doctrine of estoppel apply by assenting to or acting under such a contract. *Durkee v. People*, 155 Ill. 354, 361, 362, 367 (no estoppel as against stockholder); *Board v. Lafayette, etc.*, R. R. 50 Ind. 85, 112 (stockholders' bill to set aside *ultra vires* lease); *George v. Cent. R. R. & B. Co.*, 14 So. 752, 757 (bill by stockholders); *Central Transp. Co. v. Pullman's P. Car Co.*, 139 U. S. 24, 59, 60 (sixteen-years' operation under lease); *Penna. R. R. Co. v. St. L., Alton & T. H. R. R. Co.*, 118 U. S. 290, 317 (ten-years' operation under a ninety-nine-year lease); *Fritze v. Eq. B. & L. Society*, 186 Ill. 183; *National H. B. & L. Ass'n. v. Home Sav. Bank*, 181 Ill. 35; *Thomas v. Railroad Co.*, 101 U. S. 71, 83, 86; *Oregon Ry. & N. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 37; *Union Pac. Ry. Co. v. C., R. I. & P. Ry. Co.*, 163 U. S. 564, 581; *Towle v. Am. Blg. L. & I. Co.*, 78 Fed. 688, 689; *Wheeler v. Home Sav. Bank*, 188 Ill. 34; *Farson v. Fogg*, 205 Ill. 326, 343; *Chicago Pneumatic Tool Co. v. Jones Mfg. Co.*, 91 Ill. App. 547; *Best Brewing Co. v. Klassen*, 185 Ill. 37; *State v. Newman*, 25 So. 408; *Union Traction Co. v. City*, 199 Ill. 484, 543.

B. The doctrine of estoppel can have no application here, if for no other reason than because the lessee has not altered its position. *Hefner v. Vandolah*, 57 Ill. 520; *People v. Brown*, 67 Ill. 435; *Salem National Bank v. White*, 159 Ill. 136.

C. Moreover, the agreements of July, 1903, are new leases. *Burgess v. Badger*, 124 Ill. 288, 298; *Metrop. Elcv. Ry. Co. v. Manhattan Elev. Ry. Co.*, 11 Daly, 373, 468-494; *Henry v. Ry. Co.*, 5 Ohio Decisions (S. & C. P.) 41, 82-85; *Harkness v. Manhattan Ry. Co.*, 54 N. Y. Super. Ct. 174, 180; *Eel River Ry. Co. v. State*, 155 Ind. 433, 459, 460; 21 Am. & Ency. Law (2d ed.) 660.

VI.

A. The Chicago Union Traction Company has no power to own either the 20,000 shares of North Chicago Street Railroad Company stock nor the 32,000 shares of West Chicago Street Railroad Company stock. *People v. Chicago Gas Trust Co.*, 130 Ill. 268; *People v. Pullman's P. Car Co.*, 175 Ill. 125, 159; *Union Traction Co. v. City*, 199 Ill. 579, 611, 612, 636, 637;

De la Vergne, etc., Co. v. German Savings Inst., 175 U. S. 40; *First National Bank v. National Exch. Bank*, 92 U. S. 122, 128; *California Bank v. Kennedy*, 167 U. S. 362; *Concord, etc., Bank v. Hawkins*, 174 U. S. 364; *Easun v. Buckeye Brewing Co.*, 51 Fed. 156; *Summer v. Marcy*, 23 Fed. Cas. p. 384; *Burrows v. Niblack*, 84 Fed. 111; *Pauly v. Coronado Beach Co.*, 56 Fed. 428; *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787.

B. It follows, therefore, that the Chicago Union Traction Company had no power or right to vote said stock, even though it stood of record in the name of trustee (the tripartite agreement expressly provides that the Traction Company shall vote the stock). *Milbank v. N. Y., L. Erie & W. R. R. Co.*, 64 Howard's Prac. 20 (approvingly cited in Gas Trust case, 130 Ill. 285, and in De la Vergne case, 175 U. S. 55); *State v. Newman*, 25 So. (La.) 408, holds that it is immaterial in whose name stock is held, and that there is no estoppel by acquiescence); *Union Traction Co. v. City*, 199 Ill. 579 (stock was held in name of trustee, see p. 637); *George v. Central R. R. & B. Co.*, 14 So. 752 (no estoppel by acquiescence); *People v. Gas Trust Co.*, 130 Ill. 268 (immaterial in whose name stock was held, see p. 284); *Coler v. Tacoma Ry. & P. Co.*, 54 Atl. 413 (N. J. 1903); *Menier v. Hooper's Telegraph Wks.*, 9 Ch. App. Cas. 350; *Central R. R. Co. v. Penn. R. R. Co.*, 31 N. J. Eq. 475, 494, 495 (corporation cannot hold stock indirectly); *Parsons v. Tacoma Smelting & R. Co.*, 65 Pac. 765; *Memphis, etc., Co. v. Woods*, 7 So. 108; s. c. 7 L. R. A. 605; *Pearson v. Concord R. R. Corporation*, 62 N. H. 537, 548, et seq.; 7 Am. & Eng. Ency. Law (2d ed.) 814 (corporation cannot hold stock indirectly); 5 Thompson, Corporations, sec. 6405.

C. It was contrary to equity for the Traction Company to vote said 52,000 shares of stock on a proposition which released the company from its own default and relieved said stock from liability, it having been deposited as security against such default. *Glengary, etc., Co. v. Boehmer*, 62 Pac. 839 (Colo. 1900); *Flynn v. Brooklyn City R. R. Co.*, 158 N. Y. 493 (this case points out the iniquity of a very similar trans-

action); *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320; *McLeary v. Erie, etc., Co.*, 76 N. Y. Supp. 712 (minority can prevent oppressive contracts); *Parsons v. Tacoma S. & R. Co.*, 65 Pac. 765; *Atwater v. Am. Exch. National Bank*, 152 Ill. 605; *Robertson v. Bucklen*, 107 Ill. App. 369, 376-378; *Pearson v. Concord R. R. Co.*, 62 N. H. 537.

D. Deducting the votes of said 52,000 shares, the new leases were never approved in conformity with the resolutions of the board of directors. C. C. A. Rec., p. 164; *Haskell v. Read*, 93 N. W. 997, 999 (Nebr. 1903; majority means majority of outstanding stock and not majority of the stock present at the meeting); *Peters v. Lincoln & N. W. R. Co.*, 12 Fed. 513 (opinion by two judges. Consents cannot be treated as votes); 26 Am. & Eng. Ency. Law (2d ed.), 993.

VII.

A. The election of new directors at the meeting of July 23, 1903, was illegal and consequently the new agreements were never adopted by a legally constituted board or by legally elected officers. Constitution Ill. art. xi. sec. 3. "Act Concerning Corporations" of 1872, sec. 3; *Durkee v. People*, 155 Ill. 354; *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36; *Eidman v. Bowman*, 58 Ill. 444, 446 (the power to appoint or elect directors does not devolve upon them but that power is reserved to the stockholders); *Waterman v. C. & I. R. Co.*, 139 Ill. 658, 665, 666, 668; *Terwilliger v. Telegraph Co.*, 59 Ill. 249; *People v. Crossley*, 69 Ill. 195, 198; *Brewster v. Hartley*, 37 Cal. 15, 24; *Dow v. Northern R. R.*, 36 Atl. 510, 523; *Small v. Minneapolis Electro-Matrix Co.*, 45 Minn. 264, 267 (followed in Glucose case, 182 Ill. 631); *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534; *State v. Anderson*, 67 N. E. 207, 209-211 (Ind. App.); *Hays v. Commonwealth*, 82 Pa. St. 518; *People v. Phillips*, 1 Denio, 388.

B. Directors have no power to fill "vacancies," and cannot, under the constitution, exercise such power. Section 3 of the general Incorporation Act means "unfilled positions" "other" than directors, are "to be filled in accordance with the by-laws of the corporation." See authorities under VII.

A, *supra*. "An Act Concerning Corporations," sec. 3; Angell & Ames on Corp., sec. 144; 3 Thompson on Priv. Corp., sec. 3853; *Kearney v. Andrews*, 10 N. J. Eq. 70; Century Dictionary, "Vacancy"; Bouvier's Law Dictionary, "Vacancy"; Anderson's Dictionary of Law, "Vacancy"; *In re Lewensohn*, 98 Fed. 576, 579; *State v. Curtis*, 9 Nev. 325 (cited in Durkee case, 154 Ill. 354).

C. A court of equity has jurisdiction to determine the legality of an election of directors, where, as here, property rights are involved. *Chicago Macaroni Co. v. Boggiano*, 202 Ill. 312, 316; *Leigh v. National H. B. B. Co.*, 104 Ill. App. 438, 441, 442.

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I.

Want of jurisdiction. Jurisdiction of Federal court prior and exclusive. This court will decline jurisdiction on ground of comity, as well as of law and of necessity. This same point is a defense on the merits.

A. This objection does not require any special form of pleading. *Farmers' Loan & Trust Co. v. Lake St. El. R. R. Co.*, 177 U. S. 51, 58; *Newman v. Commercial Bank*, 156 Ill. 530.

B. The possession of the *res* vests the court which has first acquired jurisdiction, with the power to hear and determine all controversies relating thereto. *Buck v. Colbath*, 3 Wall. 344; *Porter v. Sabin*, 149 U. S. 473; *Wiswall v. Sampson*, 14 How. 52; *Taylor v. Carryl*, 20 How. 596; *Hatch v. Bancroft Co.*, 67 Fed. 808; *Clifton v. Foster*, 103 Mass. 235; *Walling v. Miller*, 108 N. Y. 177, 178, 15 N. E. 66, 67.

C. The *res* includes all rights of action, etc. *Porter v. Sabin, supra*; *Sercomb v. Catlin*, 128 Ill. 556; *Richards v. People*, 81 Ill. 551, 555.

D. The judgment creditors suits' were administrative suits. *Toledo, etc., Ry. v. Continental Trust Co.*, 95 Fed. 497, 504.

E. The creditors' suits were on behalf of all creditors. *Richmond v. Irons*, 121 U. S. 27, 51.

F. The jurisdiction of the federal court includes in its scope a complete administration of the entire estate for both creditors and stockholders. *Graham v. Railroad Co.*, 102 U. S. 148, 161; *Mellen v. Moline Iron Works*, 131 U. S. 352, 366; *Hollins v. Brierfield*, 150 U. S. 371, 382, 383.

H. The bills are an equitable levy upon all the property and rights of the defendant companies. *First Bank v. Gage*, 93 Ill. 172; *Miller v. Cherry*, 2 Wall. 237.

I. The stockholders are represented by their corporations and are bound by the proceedings. *Great W. Tel. Co. v. Gray*, 122 Ill. 630; *Ward v. Farwell*, 97 Ill. 616, 617; *Hawkins v. Glenn*, 131 U. S. 319; *Glenn v. Liggett*, 135 U. S. 533 542; *Furnald v. Glenn*, 64 Fed. 49; *Ex parte Cutting*, 94 U. S. 14, 22.

J. The rights of the stockholders were in the hands of the federal court, and could not be asserted here without the consent of the Federal court, and without the presence of its receivers. *Porter v. Sabin*, 149 U. S. 473; *Swope v. Willard*, 61 Fed. 417.

K. Relief sought must correspond to the theory of the bill. *Kellogg v. Moore*, 97 Ill. 282.

L. The *res* includes not only the estate in possession, but also the shares of stock deposited in trust. *Richards v. People*, 81 Ill. 551, 555; *Sercomb v. Catlin*, 128 Ill. 556, 562; *Farmers L. & T. Co. v. Lake St. R. R.*, 177 U. S. 51, 61.

M. Court might instruct as to voting of stock. *Atkinson v. Foster*, 27 Ill. App. 63, 68; affirmed in 134 Ill. 472.

N. In any event to avoid conflict, state court will not interfere with such instructions. *Hutchinson v. Green*, 6 Fed. 833.

O. The Federal court had the power to settle all controversies between the estates, as to their obligations under the leases. 5 Thomp. Corp., sec. 6973; High, Receivers, sec. 177; *Re Croton Ins. Co.*, 3 Barb. Ch. 642, and could authorize modifications of the leases for that purpose. *Re N. Y. Ry. Co. Receivers*, 29 N. J. Eq. 67; and see changes in *res* in *Kennedy v. St. P. & P. Ry. Co.*, 2 Dillon, 448, and *Miltonberger v. Logansport Ry.*, 106 U. S. 286.

P. The court can supervise the stockholders' meeting. *Gowen's Appeal*, 10 W. N. C. 85. ■

Q. The vote of the stockholders on August 18, 1903, approving the leases was by the affirmative vote of a majority. *Dunbar v. Kellogg Switchboard Co.*, decided by Judge Mack. (Unreported).

II.

The directors of the North & West Chicago Street Railroad companies were regularly and properly appointed on July 23, 1903.

A. The power of filling vacancies is incident to a corporation. *Kearney v. Andrews*, 10 N. J. Eq. 70, 72.

B. The constitution of 1870, art. 2, sec. 3, refers only to "elections for directors or managers in incorporated companies," and does not apply to the filling of casual vacancies in the board of directors; see secs. 3 and 6 of Act Concerning Corporations, approved April 18, 1872.

C. Contemporaneous legislative construction is entitled to great weight. *People v. Loewenthal*, 93 Ill. 191.

D. It is a matter of common knowledge, that it has been the universal practice for vacancies in the board of directors to be filled by appointment of the board. *C. & N. W. Ry. Co. v. Boone County*, 44 Ill. 240; *Linck v. City of Litchfield*, 141 Ill. 469.

E. The same legislative construction of a constitution has prevailed in other states. Kentucky Constitution, sec. 207; Rev. Stat. of Kentucky, sec. 55; Idaho Constitution, art. XI, sec. 4; Rev. Stat. of Idaho of 1887, sec. 2592; Missouri Constitution, art. XII, sec. 6; Rev. Stat. of Missouri, sec. 2772; Montana Constitution, art. XV, sec. 4; Montana Civil Code, sec. 434; West Virginia Constitution, art. XI, sec. 4, (1872); West Virginia Code, Ch. LIII, sec. 49; Pennsylvania Constitution, art. XVI, sec. 4; *Commonwealth v. Lintsman*, 23 Pitts. L. J. 122; Gen. Laws of Penn., sec. 23; Constitution of South Dakota, art. XVII, sec. 5; South Dakota Civil Code, sec. 2926.

F. There is a marked difference between the word "election," and the word "appointment." The vacancies referred to in the last sentence in section 3 of article II of the Constitution, which are to be filled in accordance with the by-laws

of the company are to be filled by appointments and not by election. *Wickersham v. Brittan*, 93 Cal. 34; *Magruder v. Swann*, 25 Md. 173; *State of Nevada v. Irwin*, 5 Nev. 111; *Police Commissioners v. City of Louisville*, 3 Bush, 602; *Conger v. Gilmer*, 32 Cal. 75.

G. Where by a law under which a corporation is organized, power is vested in the directors to make by-laws, such right is impliedly taken away from the body of stockholders. *People v. Sterling, etc., Mfg. Co.*, 82 Ill. 457; *Board of Trade v. Nelson*, 162 Ill. 431.

III.

The action of the board of directors on July 23, 1903, in authorizing the execution and delivery of the amendatory agreements, was within the powers of the board of directors, and the acts of such board in that regard were and are valid.

A. "The corporate powers shall be exercised by a board of directors or managers." Hurd's Rev. Stat. 1903, chap. 32, sec. 6, p. 473.

B. The changes brought about by the amendments were not such fundamental changes as a stockholder might complain of. *Beveridge v. Elev. R. R. Co.*, 112 N. Y. 1; *Flagg v. Elev. R. R. Co.*, 10 Fed. 413; *Sprague v. The Illinois River R. R. Co.*, 19 Ill. 173; *Penn. R. R. Co. v. St. Louis, etc., Ry. Co.*, 118 U. S. 290; *Wood v. Whelen*, 93 Ill. 153-165; *Hodder v. Railway Co.*, 7 Fed. 793; *Louisville Trust Co. v. L. N. A. & C. R. Co.*, 75 Fed. 433, 449.

C. The powers exercised by the board of directors in amending the leases were within their business discretion. *Beveridge v. Elev. R. R. Co.*, 112 N. Y. 1; *Flagg v. Elev. R. R. Co.*, 10 Fed. 413, 431.

D. All the cases cited by complainants were cases where objection was made to an original leasing, sale, or consolidation, or other fundamental change, none of them being upon the point that a lease already made cannot be amended by the board of directors, without the approval of the stockholders.

IV.

If the Chicago Union Traction Company had the right to lease the properties of the North and West Chicago Compan-

ies, under the act of 1855, and the consent of the stockholders was necessary, the consent of a majority of such stockholders was sufficient since the act of 1855 was a part of the charter contract to which every stockholder is a party. *Mayfield v. Alton Railway, Gas & Electric Co.*, 198 Ill. 528; 1 Beach on Private Corporations, sec. 353; *Nugent v. Supervisors of Putnam County*, 86 U. S. 241; *Mowrey v. Indianapolis & C. Ry. Co.*, Fed. Cas., No. 9891; *Sparrow v. Railroad Co.*, 7 Ind. 369; *Waldoborough v. Railway Co.*, 84 Me. 469; *Durfee v. Old Colony, etc., R. R. Co.*, 5 Allen, 230 (approved 143 Ill. 197); *Sprague v. R. R. Co.*, 19 Ill. 174; *Wheeler v. Pullman Iron & Steel Co.*, 143 Ill. 197.

V.

Stockholders who have voluntarily voted for an unauthorized or *ultra vires* act or contract, or who have acquiesced therein, and have accepted benefits therefrom, are estopped to contest the legality of such action. *Coquard v. National Linseed Oil Co.*, 171 Ill. 480; *Pullen v. Coal Creek Min. & Mfg. Co.*, 42 S. W. 693; *Rabe v. Dunlap*, 25 Atl. 959, 51 N. J. Eq. 40; *Levin v. Chicago Gas Light & Coke Co.*, 64 Ill. App. 393; *Memphis & Charleston R. Co. v. Grayson*, 88 Ala. 572; *Alexander v. Searcy*, 81 Ga. 536; *Da Ponte v. Louisiana Lottery Co.*, Fed. Cas. No. 3569; *Venner v. R. R. Co.*, 28 Fed. 581; *Burford v. Keokuk, etc., Packet Co.*, 69 Mo. 611; *Stewart v. Erie & Western Transp. Co.*, 17 Minn. 372; *St. Louis R. R. Co. v. Terre Haute R. R. Co.*, 145 U. S. 393; *Rogers v. R. R. Co.*, 91 Fed. 299.

A. It is an established rule that the doctrine of *ultra vires* will not be invoked for or against a corporation, where it will defeat the ends of justice, or work a legal wrong. *Citizens Bank v. Hawkins*, 18 C. C. A. 78; *O. & M. Ry. Co. v. McCarthy*, 96 U. S. 258; *Whitney Arms v. Barlow*, 63 N. Y. 62; *Jourdain v. Long Island R. Co.*, 6 N. Y. St. Rep. 89.

VI.

An Illinois corporation may own a beneficial interest in the stock of another corporation deposited with a trustee, and may control the voting thereof. *People v. Chicago Gas Trust Co.*,

130 Ill. 268; Act of June 4, 1897, as amended by Act of May 11, 1903; (Hurd's Rev. Stat. 1903, chap. 131 A, p. 1834).

A. One corporation may acquire the stock of another corporation, as incidental to the power to purchase, lease, or consolidate. 1 Cook on Corporations (5th ed.) sec. 314, p. 683; *Hill v. Nisbet*, 100 Ind. 341; *Wehrhane v. N. C. & St. L. R. R.*, 4 N. Y. St. Rep. 541; *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335; *Dewey v. Ry. Co.*, 91 Mich. 351; *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396; *MacGinniss v. Boston & M. Cons. Copper Min. Co.*, 75 Pac. 89-96; *Louisville Trust Co. v. Louisville R. R. Co.*, 75 Fed. 433.

B. One corporation may acquire stock in another in payment of a debt, or as security for a debt, or in compromise of a claim. *People v. Chicago Gas Trust*, 130 Ill. 268; *Citizens State Bank v. Hawkins*, 18 C. C. A. 78; *First Nat. Bank v. Nat. Exch. Bank of Baltimore*, 92 U. S. 122.

C. And the corporation having the power for some purposes, the question here becomes one as to the abuse of the power; and it is settled that that question can be raised only by the state. *Citizens Bank v. Hawkins*, *supra*; *Hough v. Cook Co. Land Co.*, 73 Ill. 23; *Barnes v. Suddard*, 117 Ill. 237; *Cooney v. Booth Co.*, 169 Ill. 370.

VII.

The act of February 12, 1855, provides: "All railroad companies incorporated or organized under, or which may be incorporated or organized under, the authority of the laws of this state shall have power to make such contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof."

A. This act applies to street railroads. *City of Chicago v. Evans*, 24 Ill. 52.

B. The powers of the Chicago Union Traction Company are not limited to the purposes of incorporation stated in its articles filed with the secretary of state. *People v. Chicago Gas Trust Co.*, 130 Ill. 268-285.

C. There are many other powers which a street railroad

may exercise, than those contained in the general incorporation act, which merely defines the powers generally incident to all corporations organized under that act. *Mayfield v. Alton Gas Co.*, 198 Ill. 528; *C. U. T. Co. v. City of Chicago*, 199 Ill. 484. This latter case recognizes the existence of this act as a part of the charter of a street railroad company. See also *St. Louis R. R. v. Terre Haute R. R.*, 145 U. S. 393.

D. The power conferred on street railroad companies to make contracts for leasing includes the making, as well as the taking of a lease. Century Dictionary, title "Lease;" *St. Louis v. Terre Haute R. R.*, 145 U. S. 393.

E. The Chicago Union Traction Co. was operating the Chicago Consolidated Traction Company prior to July 23, 1903. See *Chicago Union Traction Co. v. City*, 199 Ill. 579.

VIII.

The act of 1855 was not repealed by the Allen bill of 1897, nor by the general corporation act of 1872. *Hunt v. R. R. Co.*, 121 Ill. 638; *C., M. & St. P. R. R. Co. v. United States*, 127 U. S. 406; *C. U. T. Co. v. The City*, 199 Ill. 484.

IX.

The receivers of the Chicago Union Traction Company, appointed by order of the Federal court on April 22, 1903, are indispensable parties to this action, regardless of the questions of priority of jurisdiction and comity. *Taylor v. So. Pac. Co.*, 122 Fed. 147; *Knopf v. Real Estate Board*, 173 Ill. 196.

A. Upon the question of the rights of receivers in stock, see *Erie Ry. Co. v. Heath*, 8 Blatch. 536, Fed. Cas. No. 4514.

B. In a court of equity a man should either abide by a contract or repudiate it *in toto*. *Marble Co. v. Ripley*, 10 Wall. 339.

C. The validity of corporate acts must be determined by the requirements of public policy. Morawetz on Corporations, secs. 650, 653, 658.

Henry Crawford and *John C. Calhoun*, for certain other defendants.

Statement of Facts.

On August 15, 1903, a bill of complaint was filed in each of these causes—in the one by certain stockholders of the North Chicago Street Railroad Company, and in the other by certain stockholders of the West Chicago Street Railroad Company. Each of the bills was filed on complainants' own behalf as well as on behalf of all other stockholders of the respective companies against the Chicago Union Traction Company, North Chicago Street Railroad Company, West Chicago Street Railroad Company, Illinois Trust & Savings Bank, John P. Wilson and certain individuals who constituted the then board of directors of said companies.

The bills alleged that the North Chicago Street Railroad Company, hereinafter referred to for brevity as the North Chicago Company, was organized under the laws of Illinois in 1886, with an authorized capital stock of 100,000 shares, having a par value of \$10,000,000; that there had been issued and were then outstanding, including 20,000 shares on deposit with the bank, 79,200 shares; that the object for which said company was formed was, according to its charter, "to construct as well as purchase or otherwise acquire horse, dummy and street railroads * * * and to maintain and operate the same."

The bills further alleged that the West Chicago Street Railroad Company, hereinafter referred to for brevity as the West Chicago Company, was authorized under the laws of Illinois in 1887, with an authorized capital stock of 200,000 shares of the par value of \$20,000,000; that of the capital stock there had been issued and were then outstanding, including 32,000 shares on deposit with the bank, 131,890 shares; that the object for which said company was formed was, according to its charter, "to locate * * * construct * * * purchase, lease, or otherwise acquire, maintain and operate * * * street railroads, horse and dummy railroads."

The bills further alleged that the Chicago Union Traction Company, hereinafter referred to for brevity as the Traction Company, was organized under the laws of Illinois on May 24, 1899; that the object stated in its charter was "to construct,

own, purchase, acquire and lease street railroads * * * and to operate said roads owned and leased by it''; that its authorized and outstanding capital stock was 200,000 shares of common and 120,000 shares of preferred of the aggregate par value of \$32,000,000.

It was further alleged, however, on information and belief, that the Traction Company was organized and incorporated solely for the purpose and with the intention and object on the part of its promoters and incorporators and subscribers to its stock, of acquiring by lease and taking the properties of the North Chicago and West Chicago companies. The bills then set forth that on or about June 1, 1899, the North Chicago and Traction Companies and the West Chicago and Traction Companies executed written leases and a tripartite agreement stating the substance thereof as hereinafter set forth, and alleged that the North Chicago Company was then indebted to the extent of over \$2,000,000 and the West Chicago to the extent of over \$1,000,000, evidenced by notes; that under the tripartite agreement the \$10,000,000 fund deposited by the Traction Company with the bank was to be kept invested in such securities as should be designated by the Traction Company, which was to receive the income therefrom until it should make default in any obligation under the lease; that after any default such income and so much of the principal as should be required, should be distributed and applied from time to time for the payment and discharge of the obligations assumed by the Traction Company under the leases; that in the event that stocks of corporations should constitute a part of the deposit the trustees should always vote the same in accordance with the directions of the Traction Company and should on request execute a proxy to vote such stock to such person as might be designated from time to time by the Traction Company; that in lieu of \$10,000,000 cash by mutual agreement the Traction Company had deposited 32,000 shares of the capital stock of the West Chicago and 20,000 shares of the capital stock of the North Chicago Company.

The bills then recite the proceedings in the federal court, on April 22d, 1903, by the Guaranty Trust Company against

the North Chicago, West Chicago and Traction Companies respectively, under which judgments by confession were entered against each of these companies; that on these, a separate creditor's bill was filed on behalf of the judgment creditors and all other creditors; under which receivers were appointed for each of the companies with authority to operate the property under the order of the court. The bills alleged that all of these proceedings were begun pursuant to an agreement between the Guaranty Trust Company and the Traction Company that they should be so begun and that the Traction Company ought to have paid the notes given by the lessor companies on which the judgments were based.

The bills then recite the history of the Traction Companies on the West and North Sides of Chicago from the incorporation of the North Chicago City Railway Company in 1859, and the Chicago West Division Railway Company in 1861, the acquisition by the North Chicago Company as lessee for 999 years of all of the rights of the North Chicago City Railway Company, and by the West Chicago Company as lessee for the same period of all of the rights of the Chicago West Division Railway Company, said leases being dated May 24, 1886, and October 20, 1887, respectively; that under each of said leases a stipulated rental was to be paid quarterly; that shortly after said leases each of the said lessee companies had acquired a majority of the capital stock of its lessor company.

The bills then recite various large indebtednesses of the Traction Company; that its property consists solely of the railways demised and operated by it as theretofore shown together with the franchises pertaining to the same and that the total value of all the property of the Traction Company is many millions less than its liabilities; that the said North Chicago and West Chicago Companies were very prosperous until the leases of June 1, 1899, were executed; that the market value of their stocks has steadily decreased; that the total receipts of the Traction Company were entirely insufficient to pay its fixed charges and operating expenses; whereas said lessor companies if operated separately could continue to pay dividends of 12 per cent. and 6 per cent. respectively.

The bills then recite that at a meeting of each of the lessor companies on July 23, 1903, each of the then directors of the company resigned separately and that at said meeting, which it is alleged was controlled by the representatives of the Traction Company, a new board of directors was pretended to have been elected; that said meetings were held secretly without notice to stockholders; that all of said new directors are in the employ of or interested as stockholders or otherwise in the Traction Company, that a minority of them were not at the time of their election interested in the lessor companies and that all of them were selected as directors by the officials in control of the Traction Company and are under the control of said Traction Company; that in May, 1903, certain persons at the instigation of the officers of the Traction Company held themselves out publicly as a committee of stockholders of each of the lessor companies selected for the sole purpose of protecting the interest of only the stockholders of said companies respectively; that they negotiated with the officers of the Traction Company with a view of bringing about a plan of reorganization; that without consulting all the stockholders of the lessor companies the protective committee advised the acceptance of a plan devised by the Traction Company's attorneys whereby it was proposed to amend the terms of the June 1, 1899, leases, and also to amend the tripartite agreement; that if said amendatory agreements became effective they would inure to the benefit of the Traction Company and not to the benefit of the lessor companies; that said agreements were not for the best interests of the lessor companies, but were prejudicial and injurious to its best interests and to those of its stockholders; that to enable the Traction Company to bring about the execution of the amendments the newly elected directors adopted a resolution that the president and assistant secretary of said lessor companies respectively be directed in the name of the company to execute the amendatory agreements, and that the action of the board of directors be subject to the approval of the holders of a majority of the stock of the lessor companies respectively at meetings to be called for that purpose; that the agreements be deposited with

John P. Wilson in escrow to be turned over in case and when the same should be so approved by a majority of the stockholders and that a special meeting of the stockholders be called for the 18th day of August, 1903, at 2 p. m. for the purpose of considering and voting upon the question of approving such action, and for the transaction of such other business as might come before the meeting.

The bills then charge that by reason of the illegality of their elections, none of the newly elected officers and directors had any lawful power to call such meetings or to bind any of the companies, and that the meetings would be illegal; that if a majority of the stockholders of said companies should ratify the action of the directors the escrow documents would be delivered and the companies would insist that they were in full force; that it would be to the interest of the Traction Company that the agreements be ratified; but that in order that a majority of the stockholders might appear to have voted in favor of the agreements the Traction Company claimed the right to require the bank to vote the deposited stock in accordance with its directions, and that unless prevented by the action of this court it would direct the bank to vote such stock in favor of ratification; that the Traction Company had no right to own or vote any of said stock, or to direct and control how or by whom it shall be voted, and that the ownership of the stock was *ultra vires*, the Traction Company; that the proposed amendatory leases tended to stifle competition between public corporations and to create an unlawful monopoly and were opposed to public policy and prohibited by and contrary to the laws of Illinois; that none of said companies had the power under its charter and the laws of Illinois to enter into said proposed amendatory agreements, and that each of said proposed amendatory agreements was *ultra vires* each of said companies; that the said lessor companies were liable to and would have their charters forfeited if they entered into said proposed amended leases, inasmuch as to do so would be *ultra vires* acts, and that by such forfeiture the complainants' interests as stockholders would be injuriously affected; that if they be declared consummated by the par-

ties, they would be void and a cloud upon the title of the property of the lessor companies and an impairment of the vested property rights of the complainants; that the financial interests of the directors of the lessor companies lay with the Traction Companies and not with the lessor companies, and that they were so under control of the Traction Company that it would be useless to demand of them to take any steps in the name of the company to prevent the proposed agreements or to foreclose the lien of the lessor companies on the deposited stock. The prayer of the bills is, that the Traction Company be decreed to pay the lessor company whatever sum shall appear to be due it on taking an account and that in default thereof the deposited stock, subject to the rights, if any, which it may appear that any persons or receivers might rightfully have in and to said shares of stock, may be sold to satisfy such debt; that the Traction Company be enjoined from directing the bank how the deposited stock should be voted or requesting the bank to execute a proxy to vote said shares and from designating any person as such proxy; that the bank be enjoined from voting or permitting any one to vote by proxy or otherwise any of such stock; that each of the lessor companies be enjoined from permitting any of the deposited stock to be voted; that John P. Wilson be enjoined from delivering the agreements held in escrow; that the lessor companies be enjoined from in any manner altering or waiving the leases or the tripartite agreement of June 1, 1899; that a receiver be appointed of all of the deposited stock, subject, however, to such rights as any person or persons might rightfully have therein.

On June 24, 1904, complainants filed supplemental bills alleging that immediately on the filing of the original bills a summons was issued and placed in the hands of the sheriff together with a notice to be served on the defendants that on August 17, 1903, complainants would ask for an injunction in accordance with the prayer of the bills; that about the time the original bills were filed and before the sheriff was able to serve all of the defendants with the notice, the railroad and traction companies petitioned the circuit court of the

United States in the creditors' bills therein pending for, and on said day procured, an order restraining the prosecution of these suits, and on August 16, 1903, a rule was procured upon the complainants and their solicitors to show cause why they should not be attached for contempt of the Federal court; that, on October 9, 1903, the Federal court directed that the restraining order of August 15th, be continued in force and made a permanent order of injunction; that said order was appealed from and on April 16, 1904, was reversed and set aside by the United States circuit court of appeals, but that the mandate was withheld until on or about June 3, 1904. The supplemental bills further recite that the special meetings were held on August 18, 1903, pursuant to the call; that at the North Chicago meeting 56,581 shares were present in person or proxy, of which 56,499 were voted in favor of and 132 against the resolutions; that the Traction Company caused to be voted in favor of the resolution the 20,000 shares of deposited stock; that complainants were present and protested against this; that at the West Chicago meeting 95,326 shares were present in person or by proxy, of which 93,326 shares voted in favor of and 2,000 against the resolution; that the Traction Company caused to be voted the 32,000 shares of deposited stock in favor of the resolutions, and that the complainants were present and protested. Complainants further charge that if the deposited stock be not counted then 3,152 shares less than a majority of the North Chicago stock and 4,620 shares less than a majority of the West Chicago stock voted in favor of the adoption of the resolutions, and that at the time the deposited stock was voted it was already subject to forfeiture and sale by reason of the defaults of the Traction Company, and that notwithstanding this, it was voted in favor of releasing the company from its own default. The supplemental bills further charge that since said date the companies claim that the amendatory leases and agreements are now in full force, and that the original leases and agreements no longer have any force; that rental and other large sums are being paid out by the companies under the amendatory agreements; that the complainants have always protested

against the amendatory agreements and that none of their stock voted in favor of the resolutions. The additional prayer of the supplemental bills was, that the amendatory leases and agreements be decreed never to have become effective, never to have been legally executed, and to be *ultra vires* the parties thereto, and to be illegal and void and beyond the power of the lessor companies to execute, and to be of no effect as against the complainants; that the officers and directors of the lessor companies be enjoined from acting as such or transacting any business in the name of the company; that the defendants be enjoined from transacting any business under or ratifying the validity of the amended agreements, and that it be decreed so far as respects the complainants that the lease and tripartite agreement of June 1, 1899, are in full force and wholly unaffected by the amendatory agreements.

On June 27, 1904, the Traction Company filed its answer setting forth in full the proceedings in the Federal court including the assignment by the lessor companies to the receivers of all of their property pursuant to the orders of that court and charging that by virtue thereof the Federal court had prior and exclusive jurisdiction of all matters embraced in the original and supplemental bills.

The answer denied that the Traction Company was organized with any other intention or for any other object than that stated in its charter and charged that as the complainants had been stockholders long prior to June 1, 1899, they were estopped from objecting to the execution of the leases of said date as *ultra vires* or illegal. It further denied every intendment of collusion in reference to the proceedings against each of the companies in the Federal court; it denied that its assets consisted entirely of the property demised under the leases and charged that since the making of the leases it had acquired divers property real and personal for the purposes of its corporate business. It further denied that it had been paying dividends of 12 per cent. and 6 per cent. respectively to the stockholders of the North and West Chicago Companies since the execution of the leases, but charged that it had paid to the lessor companies the rental reserved and that said rental

for convenience was distributed *pro rata* among the stockholders of record, and that such rental amounted to 12 per cent. upon the capital stock of the North Chicago and 6 per cent. of the capital stock of the West Chicago Company, and that the receivers had continued to pay such rental and had distributed the same *pro rata* among the stockholders as was authorized by the terms of the lease until July 15, 1903. The answer then sets forth various reasons for the depreciation in the net earnings of the Traction Company, among others the heavy taxation, the increase in the price of labor and materials, and the inauguration of the universal transfer system. It denied that either of the lessor companies if operated separately could continue the payment of 12 per cent. and 6 per cent. dividends respectively, or anything like such dividends. It denied that the special meetings of the board of directors were in any manner influenced or controlled by the Traction Company and alleged that on the contrary they were conducted by and on behalf of the lessor companies pursuant to the by-laws and in conformity with the law. It further denied that any of the new directors of the railroad companies were in the employment of or interested as stockholders in the Traction Company, but that on the contrary each of them was the owner of stock in that company of which he had been elected a director. It further denied that all or any of said directors were prior to their elections selected as such directors or were then under control of the Traction Company, or that they are now or ever were subservient to or under the control of the Traction Company. It further denied that the protective committees acted or were selected at the instigation of the Traction Company, but, on the contrary, alleged that they were selected by persons holding and owning a majority of the capital stock of the lessor companies (outside of the deposited stock). It further alleged that the negotiations resulting in the amendments were conducted by the protective committees on their own motion on the advice of their own counsel after a thorough examination and were not influenced or attempted to be influenced by the Traction Company. It denied that the amended leases would inure to its benefit and

not to the benefit of the lessors, or that they were not for the best interests of the lessors, or that the amendatory leases tend to stifle competition between public corporations or create an unlawful monopoly, or that they are opposed to public policy or prohibited by or contrary to the laws of Illinois, or that any of the companies has not the power under its charter and the laws of Illinois to enter into said amendatory agreements, or that any of said companies will have its charter forfeited if any of said amendatory agreements are entered into. The defendant further denied that the property rights of the complainants as stockholders would be injuriously affected by the adoption of the amendatory agreements, or that they would constitute a cloud upon the title of the property of the railroad company, but alleged that on the contrary they would be greatly to the benefit of the complainants as such stockholders. It further denied that the financial interests of the directors of the lessor companies lies with the Traction Company and not with the lessor companies, or that they are under the control of the traction companies so as to render a demand of them useless, but it alleged that on the contrary the financial interests were solely with the lessor companies.

The defendant further answering alleged that every stockholder had since the execution of the original leases received and accepted as rental under the lease his proportion of such rental and thereby had sanctioned and ratified the lease; that the complainants during their entire ownership of stock up to September, 1903, had likewise received and accepted such rental and were thereby estopped.

The defendant further alleged that the protective committee were elected and always remained free from any influence on the part of the Traction Company; that they had immediately insisted upon the defendant agreeing to a change in the board of directors; that they had had entirely independent counsel and were in no manner influenced by the defendant or its representatives; that the discussion between the two sides extended over several weeks and were most thorough in every respect; that on July 25th, 1903, the protective committee mailed to every stockholder including the com-

plainants, a statement showing the advantages and disadvantages of the amendment, and also mailed to each of them a copy of the amendments and modifications to the leases and tripartite agreements.

Defendant further answering alleged that of the 22,619 shares of North Chicago stock not voting at the meeting all except a few shares, not exceeding in number 1,778, had since assented to and acquiesced in the amendment and received and accepted the benefits thereof, and that of all the remaining shares of the West Chicago Company which did not vote at said meeting the holders of all except a few shares, not exceeding in number 1,218, had since assented to and acquiesced in the amendments and received and accepted the benefits thereof. It alleged further that the proxies appointed to vote the deposited stock in no respect whatever acted under the control of the Traction Company, but in every respect acted independently of the company and solely in the interest of the lessor companies; that the holders of the proxies were directors in the lessor companies.

The defendant denied that it itself had done anything under the agreements since August 18th, 1903, or that any moneys had been paid out thereunder by it or with its consent, but it alleged that without its procurement or consent the receiver of its property did under order of the Federal court and with the consent of the complainant in the suit in the Federal court pay the rental of October 15th, 1903, due under the amendatory lease, and that by request of the North and the West Chicago Companies the receivers distributed the rental to the stockholders of the North and West Chicago Companies not including the deposited stock, *pro rata*; and that all of the stockholders except complainants and a few others holding altogether not more than 1,807 shares of the North Chicago Company, and 1,216 shares of the West Chicago Company had accepted and received said money under said amended agreements as payments thereunder, and with full knowledge thereof.

Appended to the answer of the Traction Company and as exhibits thereto are the various leases and agreements.

The important changes in the leases are as follows:

First. Under the original lease the railroad company "sells, assigns, transfers and sets over to the Traction Company" the 999 year lease of May 24th, 1886, which it had received from the railway company; under the amended lease the railroad company; "does hereby, grant, demise, lease and sublet" unto the Traction Company "all the railways and other property held by it under the said lease of May 24th, 1886, for the term of 984 years from June 1st, 1889."

Second. Under the original lease the railroad company further demised and leased to the Traction Company all railways owned and operated by it and as the same might thereafter be located or constructed, together with all its moneys, securities and choses in action for the full term of years extending during the unexpired charter life of the railroad company (which was 99 years from the date of the charter), and *all extensions or renewals thereof*. Under the new lease, securities and choses in action are omitted, but "all contract and ordinance rights, franchises and privileges," are added. The new lease is moreover for the full term of 984 years from the 1st day of June, 1899.

Third. The new lease adds the provision that new equipment, extensions, improvements, and ordinance rights shall become and remain subject to the lease as though forming part of the demised property.

Fourth. Under the old leases the rental to be paid was equivalent to a 12 per cent. dividend on the North Chicago stock and a 6 per cent. dividend on the West Chicago stock, and was expressly agreed to be paid. In addition to other obligations, the Traction Company further assumed and agreed to pay or renew all notes, bonds or mortgages of the railroad company and the accruing interest thereon, and covenanted, for the purpose of securing the payment of the rent and the performance of the other obligations, to deposit with the Illinois Trust & Savings Bank such amount as might be determined by the tripartite agreement; the agreement fixed this amount at \$10,000,000 in cash or securities. Under the amended lease the Traction Company agreed to pay all inter-

est and other charges upon the mortgage, bonds and other indebtedness of the railroad company and all interest and sinking fund payments maturing upon the mortgage bonds or other obligations that might be issued for reconstruction and extension. As rental, however, it agreed to pay quarterly the entire net earnings from the operation of the demised road, provided this did not exceed a sum equivalent to an annual dividend of 12 per cent. and 6 per cent. respectively to the lessor companies, and any accumulated rentals. If the net earnings for any quarter-year should be less than this amount, an amount equal to the difference should be paid by the Traction Company as additional rental out of its net earnings from all its other railways after payment of rentals and other fixed charges; but as a similar agreement is made with both roads if the net earnings are insufficient to satisfy both obligations then they shall be divided in proportion to the deficiencies; but any deficiency remaining shall not, except as hereinafter provided, constitute a charge against the Traction Company or the subsequent earnings of its railways. If for any quarter-year the earnings shall be less than enough to pay a minimum rental equal to 6 per cent. and 3 per cent. annual dividends, respectively, the deficiency shall be a cumulative charge against the net earnings of the demised property and of the other properties of the Traction Company, and shall be paid without interest out of the first surplus of such earnings in the same or in subsequent years remaining after the payment of current rental or other fixed charges thereon to the extent and as long as there shall be any surplus earnings and before any dividends shall be declared on the stock of the Traction Company.

The Traction Company guarantees that its net earnings will be sufficient to pay the minimum 6 and 3 per cent. dividends respectively, on the 15th day of October, 1908, and on each subsequent rent day and it expressly agrees to pay said fixed minimum rentals quarterly. The term "net earnings" with reference to the demised property, shall include all income from said property subject to the deductions specified. All fares, tolls, profits, use and benefit from the demised

property shall be included in determining the income therefrom; there shall be deducted from the gross income to ascertain net earnings the following items: All amounts which the Traction Company must pay under the leases of 1886 and 1887; interest and other charges on the bonds of the railroad company; such proportion of any deficiency arising from the operation or control of existing feeders or connecting lines as may be agreed upon between the two railroad companies and the Traction Company; interest and sinking fund payments on mortgage bonds or obligations issued for reconstruction or improvements of the railways, demised; operating expenses of the demised property including repairs, replacement expenses and expenditures of litigation. The costs of new equipment and expenditures for change of motive power or its increase however shall not be charged as operating expenses, but may be paid from the proceeds of bonds, and interest and other charges thereon shall be taken into account in the ascertainment of the net earnings. As part of the operating expenses there shall be included such proportion of the general expenses of the Traction Company as the gross earnings of the demised property bear to the gross earnings of the railways owned, leased or operated by the Traction Company; a reasonable charge for depreciation of plant and equipment; all taxes including a proportionate part of any taxes assessed on the entire system; all amounts paid on account of injuries to persons or properties by the operation of the railways demised.

The term "net earnings" as used with reference to the entire system of railways shall include all income of every description from railways owned, leased or operated by the Traction Company, and all income from its other property, and there shall be deducted from the gross earnings the above items and also corresponding charges arising in the operation of the other railways controlled by it, together with interest on its bonds. The lessee further assumed to pay all indebtedness of the lessors then existing, or that might thereafter be created at the lessee's request. It further agreed to pay on October 15th, 1908, and each year thereafter, \$70,000 of

the principal of the present indebtedness of the lessors exclusive of that represented by mortgage, but said amount is to be payable only out of the net earnings of the Traction Company for the preceding year; any deficiency shall not constitute a charge upon the Traction Company, or any subsequent earnings. No dividend, however, shall be declared or paid in any year on the stock of the Traction Company until this amount is provided for.

Fifth. The new lease contains this specific clause not in the old—that in case of default in the payment of the cash rentals agreed to be paid by the Traction Company, or in case of any other default, and if any such default continue for five months, then the term demised shall expire, cease and determine, and the lessor shall have the right to enter upon and take possession of the demised property, and thereafter operate and control the same and apply the net proceeds to the payment of arrears or of accruing obligations, and when all items are fully paid, it shall restore possession of the demised premises to the lessee. It shall also have the right, if such default shall have continued for the specified period, to sell the lease and all the rights of the lessee at public auction, and apply the proceeds to the satisfaction of all arrears of rent.

Sixth. The new lease further provided that as the amendment was to take effect as of September 1st, 1903, whereas the next quarterly rental would not be payable until January 15, 1904, there should be paid on October 15, 1903, a certain sum equivalent to a continuation of the former rental, such payment to be generally on account of the rent to accrue under the amended lease. Except as amended, the old leases were expressly confirmed.

On the filing of this answer the motion of complainants for a preliminary injunction came on for hearing. Affidavits were filed by both parties and oral testimony was submitted. The motion was argued orally at great length, and supplemental briefs were submitted. Pending the decision of the court it was stipulated that no action should be taken by the defendants under the amended leases.

MACK, J.:—

At the threshold we are met with the objection that this court has no jurisdiction in the premises; that all matters as well as the entire property involved in this litigation is subject to the prior jurisdiction of the Federal court in the creditor bills there pending; that comity bids this court to dismiss the bill and to remit the parties to the Federal court for an adjudication of their rights.

In opposition to this plea, it is urged that the circuit court of appeals has expressly held that this court has jurisdiction and in support thereof reference is made to the decision of that court, reversing the order of Judge Grosscup which restrained the complainants herein from prosecuting their suit.¹

That the circuit court of appeals believed this court had jurisdiction is apparent from the following language in the opinion rendered by Judge Jenkins:

“We are unable to perceive that the prosecution in the state court of the suit enjoined by the decree appealed from, does in any way interfere with the possession of the *res*, by the receivers or encroaches upon any rightful jurisdiction under this creditors’ bill.”

I agree however with the argument of defendant’s counsel that this decision is not conclusive of the question. The sole issue before the Federal court was whether the power to enjoin an action in the state court, restricted as it is both by federal statute and by the comity that prevails between the Federal and state courts, had been rightly exercised or not, whereas the question here in issue is whether the Federal court has acquired such prior and exclusive jurisdiction over the subject-matter that a state court must or should refrain from acting.

The views of the circuit court of appeals are however very persuasive and reinforce the conclusion to which I have arrived that though the full measure of relief prayed for could not be granted by this court, nevertheless this court has full and complete jurisdiction to determine the rights of complain-

¹ See *Guaranty Trust Co. v. North Chicago Street Railway Co.*, 130 Fed. 801. *Certiorari* denied, 194 U. S. 638.—Ed.

ants as stockholders in relation to the corporation itself and to the other stockholders.

The litigation in the Federal court is in no respect in the nature of winding up proceedings; the suits are mere creditors' bills for the enforcement of unpaid judgments and other debts. The entire property and property rights of each defendant corporation are in the custody and control of the Federal court for administration and if necessary, sale, and the stockholders' interests in those assets, being dependent on the rights of the corporation itself, is necessarily within the jurisdiction of that court.

But such control and jurisdiction, for the sole purpose of paying the debts of the corporation, does not subject either the corporation or the stockholders to the exclusive jurisdiction of that court in their relations *inter sese* or oust this court of jurisdiction to determine whether or not the alleged directors are the legal directors of the corporation, whether or not certain acts alleged to have been done by the corporation either through its directors or stockholders, are the legal acts of the corporation, binding upon all stockholders.

That the bill prays for an accounting between the corporations, that is to say a determination of certain liabilities and assets of each corporation—one of the specific objects of the creditor's bill and as to which prior and exclusive jurisdiction is vested in the Federal court—does not deprive this court of jurisdiction to determine other and vital matters as to which relief is sought.

More serious, perhaps, than the objection of lack of jurisdiction over the subject matter, is the objection of lack of necessary parties for a full hearing. It is strongly urged that this court cannot proceed to hear and decide any question here involved, in the absence of the receivers of the several corporations; that none of the receivers are parties defendants or can be made such, without leave of the Federal court, and that for want of necessary parties, the bill must be dismissed.

That all of the property rights of the corporations are vested in the receivers must be conceded; it follows from this,

that the court could not, unless the receivers be made parties to the litigation, determine any matters affecting these property rights, that would be binding on them; and it would follow, ordinarily, that unless the court could bring within the binding effect of its decree all parties having an interest in the subject-matter, it will refrain from acting. But there is no imperative rule, absolutely prohibiting a court of equity from adjudicating the rights of those litigants who are before it, even though such adjudication may affect others without being *res adjudicata* as to them. Irrespective however of this, and conceding that the court should not or could not adjudicate upon matters in which the receivers as such have a direct interest, it does not follow, in this case, that the bill should be dismissed; the same answer may be made to this objection as is made to the point that the Federal court has exclusive jurisdiction, namely, that there are matters properly presented for adjudication as to which the receivers are not necessary parties.

The receivers are not stockholders of the company; they have at the best an equitable interest in some stock; their rights are fully and completely represented by the bank, the legal stockholder and trustee.

Ordinarily a *cestui que trust* is not a necessary party to litigation in which it is fully represented by its trustee. Controversies as to voting power of stock, as to questions of majority rule, as to the legality of the election of and the extent of the power of directors, are not ordinarily within the exceptions to this rule. It may be, of course, that the trustee does not truly represent the *cestui que trust* or that conflicting interests of several *cestuis que trustent* should be brought to the attention of the court, but with these, the other stockholders have no concern; they need look only to their co-stockholders of record in litigation affecting the internal affairs of the corporation. And this I believe to be true even though the case presents a question such as arises here, in which the right of a stockholder of record to vote is questioned, not because of any lack of power of that stockholder as such to act but because of alleged inability of the *cestui*

que trust to control the stock or voting power. The ultimate question for decision, nevertheless is, has the bank, the legal stockholder, certain rights; the bank itself is fully capable of defending those rights on its behalf as well as on behalf of its *cestui que trust*. The receivers, therefore, are not indispensable parties even under a stricter doctrine of necessary parties than has been adopted either by the Federal or many state courts. Moreover, any rights that they may have acquired since this court obtained jurisdiction by the filing of the bill and the issuance of process, and with full knowledge of these proceedings, would not prevent this court from acting though the receivers are not made parties. The additional prayers of the supplemental bill are aimed at undoing that which the original bill sought to prevent and it would be the duty of this court to annul any act, the doing of which should and would have been enjoined, but for the intervening injunction of the Federal court, if the rights acquired thereunder were obtained with knowledge of the pendency of this suit.

This leads then to a consideration of the merits of the case on the pleadings, affidavits and testimony heard so far at least as may be necessary in order to determine whether a preliminary injunction should be granted.

There is little controversy on the facts. In the opinion of the court, the charges of fraud or wilful wrongdoing by the protective committee or by those representing the Traction Company in their dealings with the members of the protective committee or with the stockholders of the underlying companies are not sustained.

It may be that the action taken in amending the leases and tripartite agreement was unwise from a business standpoint; it may be that subsequent developments have thrown new light on the situation and that some who once approved would now join hands with those seeking to annul. On these points, the court expresses no opinion and wishes to be understood as not intimating any opinion whatsoever, firstly, because on a business proposition, the judgment of able business men financially interested who, as the court views the evidence, are absolutely free from the slightest personal or material inter-

est in the opposite side of the question, is of greater value than that of the court, and secondly, because, in the absence of fraud, or mistake, and merely because of a difference of opinion on the wisdom of a business act, the court could not undo that which has been done.

It cannot be denied that the Traction Company displayed the utmost care in guarding its own interests when it carefully refrained from permitting a new board of directors of the underlying companies to be elected until it knew just exactly what kind of amendments and modifications would be adopted and recommended by them; and it may be that the protective committee should have insisted on the election of the new directors irrespective of the pending controversies. If such a demand had been conceded, it may be that modifications more favorable to the underlying companies would have been secured. But the failure so to insist, particularly in view of the probable refusal of the Traction Company to grant the demand, cannot be said to be such dereliction of duty or fraud as to lend the weight to the charge that the protective committee was under the domination of the Traction Company. Nor is the fact, expressly stated to the stockholders in the circular letter, that counsel for the protective committee would be paid by the Traction Company and that the committee itself would be similarly reimbursed for the expenses incurred by it, even though it be coupled with the further fact, not stated to the stockholders, that Mr. Robbins had accepted the retainer without a fee and with the express statement by those employing him that they did not know when or how his services would be compensated for, sufficient to charge the committee or their counsel with wrong-doing or neglectful disregard of those interests which alone they purported to represent. It may be that the committee did become legally indebted to Mr. Robbins but if not, it may be that he had such confidence in the outcome, because of the apparent absolute necessity of an adjustment of the differences between the Traction and the underlying companies in order that they might present a united front in their joint controversy with the city, that he was satisfied to take chances on getting his fees.

No opportunity for criticism would have been afforded if the members of the committee, having and representing large interests had paid counsel fees and expenses on behalf of all the stockholders whom they represented or if they, at least, had guaranteed these payments, irrespective of the success or failure of the efforts at adjustment.

Nevertheless the court is clearly of the opinion that the acts of neither the counsel nor the committee were influenced by the omission to take such steps as the exercise of the highest degree of prudence would perhaps have demanded.

Irrespective however of the charges of fraud, complainants contend that the execution of the new document should have been enjoined and that they should now be declared null and void as illegal and *ultra vires*.

No citation of authority is required for the well established proposition that a public service corporation is without power to grant, by way of lease, all of its property, thereby disabling it from personally performing its duties to the public. The state may certainly object to such a lease and any stockholder who is not otherwise equitably estopped may prevent the consummation of such an illegal act.

On the other hand it is equally clear that if the public policy or statutory law of the state permits such a corporation to execute such a lease, neither a stockholder nor the state can object on the ground that the act is illegal.

It may, however, notwithstanding such statute, be *ultra vires*. The charter granted to a corporation in a state having such a statute might expressly provide that the property shall not be leased. Under such circumstances, though the corporation would be legally empowered to execute a lease so far as the state is concerned, in other words though the act would not be illegal or *ultra vires* in the strict sense, nevertheless as the act would be a breach of the compact between the shareholders, any shareholder could object and enjoin the transaction. But as the right so to object is personal to the stockholder, he may, by his acquiescence, estop himself and his successors in title from thereafter objecting, and though the purposes for which a corporation is chartered can be changed only

in the manner fixed by statute, yet such an estoppel arising against each stockholder, effectuates a virtual change in the purposes of the corporation. To this extent the distinction sought to be made by complainants between the powers of a corporation and the object and purposes for which it is formed, is good. Though legally capable of doing certain things so far as the state is concerned, the corporation may be enjoined from exercising the power, if such action would be contrary to its declared objects.

The corporation is not merely a creature of the state limited in its powers to those conferred upon it by express terms or reasonable implication therefrom; it is also the creation of the stockholders—created by them for certain definite purposes, to the prosecution of which each has contributed a definite amount of money. Unless the agreement—including therein the law under which the charter is granted—otherwise provides, unanimous consent of the stockholders is required for a fundamental deviation from these agreed purposes or for a change in the relative rights of the shareholders. And even though the charter itself provides that the capital stock may be increased and subsequently provides that all the powers of the corporation are conferred on the board of directors, it is held that only the ordinary powers are there referred to and that the power to increase the capital stock and thus possibly alter the relative interests of the stockholders is so fundamental a change as to require unanimous consent. *Railway Co. v. Allerton*, 18 Wall. 233.

The increase in that case without such consent would not have been an act *ultra vires*, in the strict sense; the corporation had the power—the exercise of it however would have been a violation of the rights of each non-assenting stockholder.

Assuming now that the underlying companies had the power under the law of 1855 to grant, and the Traction Company to accept this lease, can it be said that the execution of such a lease was within the corporate purposes for which the underlying companies were formed. The charter does not expressly provide that a lease shall not be made. The incorporators

must be assumed to have known that the state had waived any objection that it might have had and had expressly conferred this power on any railroad thereafter formed.

That these corporations were formed under the general incorporation act which is silent as to the power to lease is clearly immaterial. In view of the express grant in the act of 1855, it cannot be held that the denial of a power to lease can be implied from the language of the act of 1872.

It is true that the expressly stated object of the corporation was to construct and maintain a street railway. It is also true that the work of a lessor corporation in receiving a fixed rental and dividing it as a dividend, is totally different from that of an operating company. It may be conceded, too, that unless the company were expressly empowered to lease, even a manufacturing corporation, according to some of the authorities, could not, by the mere act of its directors or even without unanimous consent, change its character from an operating to a leasing company.

Nevertheless, as these companies had, on the above assumption the necessary power to lease, their act could not be illegal or *ultra vires* in the strict sense.

Whether the change was so fundamental a character as to come within the principle of the Allerton case, is a question involving a conflict in the authorities. The reasoning in the Beveridge case, 112 N. Y. 1, followed, since the arguments were made herein, in the case of *Wormser v. Metropolitan St. R. R.*, 98 App. Div. 29, Van Brunt, P. J., concurring, and holding that this is an ordinary power vested in the board of directors is very persuasive, notwithstanding the extremely able decision of Van Brunt, J., in *Metrop. El. R. R. Co. v. Manhattan Elev. R. R.*, 11 Daly, 373, to the contrary.

When the court in the Allerton case added the dictum that "changes in the purpose and object of an association are necessarily fundamental," "Mr. J. Bradley evidently had in mind a change in the character of the business like a change from transportation to manufacturing." *Louisville Tr. Co. v. L. N. A. & C. R. Co.*, 75 Fed. 433, 448. See Taft, J., distinguishing the Allerton case.

It is, however, unnecessary to decide whether or not the board of directors or even a majority of the stockholders could have made the original lease. At least for the purposes of this case we must assume that they were valid inasmuch as they are not attacked by the complainants, and as the complainants pray in their supplemental bill that it be decreed as to them that the original leases and agreement are in full force and effect. Moreover, as every stockholder has acquiesced therein, and as, on the assumption made as to the effect of the act of 1855, the original leases are not *ultra vires* in the strict sense, such assent, together with lapse of time, creates a valid estoppel.

Assuming, however, that the original lease was a fundamental change requiring this unanimous consent to make it valid, is the new lease of the same character? If the original lease had been strictly *ultra vires* and illegal, incapable of ratification and as to which no estoppel could arise, even by direct assent thereto, it might well be contended that the new instrument could not be properly called an amended lease, and that whether amended or original, it virtually changed the purposes of the corporation. If the original lease, however, was not illegal or strictly *ultra vires*, then the company had by unanimous consent of the stockholders and with the express permission of the state, become a mere leasing corporation. What the stockholders had acquiesced in moreover was not, merely, that a certain lease with certain terms should be made, and that thereafter no other lease should be made without a like unanimous consent; they had necessarily also consented that the fundamental character of the corporation should likewise be changed from that of an operating to a mere leasing company. This consent by virtue of the unanimity operated not merely as an estoppel against such consenting stockholder; if it were only this, the argument that the shareholder was thereby estopped from objecting to that particular lease but not to any other would be good. It operated as a contract binding on all and working a change in the corporate purposes. When it was proposed to enter into a new or amended lease, the contemplated act was no

longer a fundamental change requiring unanimous consent, it was an important transaction, it seriously affected the interests of the stockholders, but it was only an important not a fundamental change of the company's business. It was such a change as a board of directors usually refrains from making without the sanction of the majority of the stockholders; and in this case, it was expressly conditioned upon such consent.

The board of directors is merely the agent of the stockholders; it has only such powers as are conferred upon it by the action of the majority of the stockholders, unless it be otherwise provided by statute. In this state, it is specifically provided that the corporate powers shall be exercised by the board of directors. Notwithstanding such a provision it is held, in some states, that this has reference only to ordinary corporate powers; that important matters must be referred back to the principal, the general body of stockholders.

In *Dickinson v. Consol. Traction Co.*, 114 Fed. 232, it is said by Gray, J.:

"The objection most seriously and strenuously urged is, that although express power may be given to a corporation to lease, that power cannot in the absence of express legislative authority to the contrary, be exercised without the assent of all the stockholders. It is argued with some plausibility that without express legislative authority, a corporation could not make a lease of its property and franchises even with the assent of all its stockholders, and that express legislative authority to make a lease is only a conferring of a power, not existent without such legislative grant, upon the whole body of stockholders. Many cases have been cited in the brief and in the argument to support these propositions. The distinction, however, between these cases and the one at bar, is that the former concern grants of legislative power to lease to corporations already in existence and whose stockholders have subscribed under the conditions of the original charter by which no such power was given. The implied contract between the stockholders *inter sese* in such cases, is as already stated that no such additional power so radical in its nature, though conferred by legislative authority, shall be capable of being exer-

cised without the assent of all the stockholders. In the case before us, however, the power to lease was conferred by the act under which both corporations were formed. * * * The power to lease having been so given without prescribing any mode in which it was to be exercised, it must be classed with the general powers conferred by a charter which are to be exercised by the majority of corporators of stockholders." See, too, Baldwin, Railroad Law, 455.

In the Beveridge case, on the other hand, it is held that the right so to lease is within the powers conferred on the board of directors.

Despite the fact that directors conditioned the lease upon the assent of the majority of the stockholders, it may be important to determine whether such assent would otherwise have been necessary, because, if the board of directors, acting alone, had had the power, then the question of the true meaning of the expression "a majority of the stockholders," whose ratification was made on condition precedent to the execution of the lease, depends solely upon the intention of the board of directors;—that is to say, if they needed no sanction but voluntarily made their act conditional upon ratification by certain parties, described by them as "a majority of the stockholders," in a conflict as to the interpretation of this expression, the intention of the board of directors, if discoverable, will govern, even though the expression would ordinarily have a different meaning. On the other hand, if action by a majority of stockholders is required by law, it must be ascertained what the law intends by a majority and in determining this, the intention of the board of directors is entirely immaterial.

Moreover if it be held that the board of directors alone have this power, the question raised by the complainant as to the legality of the election of the new directors becomes important.

Complainants contend that all vacancies in the board of directors must be filled by the stockholders. Const. Art. XI, s. 3; R. S. ch. 32, s. 3.

The language of the constitution and the statute is "that

in all elections for directors" every stockholder shall have the right of cumulative voting, and that "such directors shall not be elected in any other manner." The statute also provides for a classification of directors so as to permit of elections for three years and concludes "all other vacancies to be filled in accordance with by-laws." Complainants urge that the word "other" means "other than directors." Defendants say that it means "vacancies, including that of directors, other than by expiration of term of office," and that both constitution and statute refer only to the regular annual elections and not to the temporary appointments for unexpired terms.

The universal practice in Illinois for at least 35 years is in accordance with defendants' views. While not conclusive of the question, nevertheless this fact is entitled to great weight in arriving at a correct interpretation. This court is not disposed to overthrow a practice so long established, especially in view of the fact that the clear purpose of the constitutional provision was to provide for minority representation—not otherwise to regulate the election of directors. This end would be even less attainable if stockholders rather than the directors are to fill each single vacancy as it arises. The court therefore holds that the *de facto* directors are also directors *de jure*.

The changes in the lease were important; they did not, however, fundamentally change the business or purposes of the corporation as they then were established. Whatever may be the right of the stockholders on an original lease, the board of directors must be held to have authority in Illinois to make the changes here in question. The most important of these, the only ones in fact that can be deemed of great importance to the stockholders of the underlying companies were the waiver of the right of forfeiture for alleged defaults and the decrease in the rental to be paid.

What, then, did the board of directors mean when they required that the lease delivered in escrow should be turned over to the lessee "in case and when the same shall be approved by a majority of the stockholders of this company," and that a special meeting of the stockholders should be

called "for the purpose of considering and voting upon the question for approving the action of the board of directors," etc.

Does this require a majority of the stock of the company or a majority of the stock voted or represented at the meeting; and if the stock of the company, does it include such stock as is outstanding but which, because of an illegal holding or for some other reason, cannot legally be voted?

The board of directors knew that a part of the stock was held in trust by the bank under the tripartite agreement; they knew that there would be some question as to the legal power to vote this stock; they knew that excluding this stock from voting, but including it in the total stock; they did not at the time control a majority of the stock. In the recommendations for modifications of the lease adopted by them as a solution of the difficulties, they say:

"6th. The modifications when made shall not go into effect *against* the objections of a majority in interest of the stockholders," and in the circular letter to the stockholders, dated July 25, 1903, they say, referring to the advantages of the changes, "2nd. It will not be possible any longer for the lease to be modified by a directory elected by a bare majority of your stock including 'the bank stock;' it will require the sanction of five-eighths of the entire stock; that is, a majority of the stock excluding these 32,000 shares."

If the language of the resolution is to be interpreted according to the intentions of its framers, then clearly in the light of these contemporaneous documents it must be held that the only sanction required was that of the holders of a majority of the stock, including the bank holdings, irrespective of whether the latter could legally be cast or not—i. e., unless a majority or, at any rate, one-half of the stock either did not vote or voted against the changes, they should become effective. This condition was complied with. Counting the bank stock, a majority favored the change. Excluding it, a majority of the other shares favored the change. In any event, not a majority of the total issue, including all not voting with the opponents of the resolution, disapproved of it.

If, however, the court be wrong in considering these other

documents, and if only the usual and customary meaning of the language of the resolution is to be sought, or if the court be wrong in holding that the directors would have had the right to adopt the new leases without consulting the stockholders, and if it be the law that the sanction of the holders of a majority of the shares is essential, it then becomes necessary to consider whether that sanction has been given.

Complainants contend that one Illinois corporation cannot own stock in another Illinois corporation except under certain exceptional circumstances, not necessary to be here considered; that such holding is both *ultra vires* because of lack of charter power and illegal as against the public policy of the state; that though the legal title is vested in the bank (whose corporate power to hold and vote stock, the beneficial interest of which is in an individual, would not be questioned), nevertheless the equitable title is in one or both traction corporations; that such equitable control is equally void as against public policy and *ultra vires*; that whilst the stock is outstanding and would, at dissolution, be entitled to share in the distribution and is therefore to be counted as a part of the capital stock of the corporation, nevertheless the voting power is suspended during the pendency of the illegal and *ultra vires* holding; that notwithstanding the suspension of the voting power, at least the clear majority of all outstanding stock, counting the illegally held portion to ascertain the total issue, but not counting it as voting, is essential to the validity of the new lease.

So far as this requirement is based on the language of the resolution as requiring perhaps something more than the law would otherwise have demanded, the answer is that either the specific intention of the directors must control the interpretation of the language, or a general intention to require that which the law itself demands for a majority whatever that may be, must be attributed to them. If the former, then as heretofore stated, a majority have sanctioned the transaction.

It remains, therefore, to inquire what the true meaning of "majority" is, under the rule that the assent of a majority of the stock is needed. The authorities conflict as to whether,

at a regularly called meeting, a majority of the shares represented, a quorum being present, is empowered to bind the entire body. If it be, then a majority has sanctioned the new lease.

If, however, it be the law that a majority of the shares represented is not sufficient and that a majority of the entire outstanding stock is required, then the further question remains—shall stock incapable of being legally voted be counted as part of the outstanding issue for the purpose of determining what is a majority? Suppose a clear majority of the stock were so illegally held; it would follow that unless this were corrected, no business could ever be transacted, no election of directors ever be held while this situation lasted. The minority instead of being protected would be rendered powerless. It follows that such illegally held stock is not to be counted; that a majority of the balance of the stock is the majority that the law would demand, whenever corporate action requires this sanction. And a similar meaning would be given to the language of the resolution here in question, if the intention that must be attributed to the directors is to control. In this sense then, too, a majority of the stockholders have given their sanction.

If, however, a clear majority of all stock is necessary, then we must ascertain whether the stock deposited with the bank may be legally voted.

The public policy of Illinois clearly forbids the acquisition by one corporation of a majority of the stock of another corporation for the purpose of controlling it. This much is established by the decisions of the supreme court.

There is no express legislation forbidding or permitting the holding of a minority interest, except in specific cases. For some purposes, as in payment of an honest debt, such acquisition may be made as incidental to the express powers. Ordinarily a corporation is not in business for the purpose of investing its moneys, but for the purpose of employing them in its normal and legitimate enterprises. The purchase of the stock of another corporation for investment purposes is therefore generally beyond the corporate power. It may,

however, in the due course of business become essential to invest part of the funds as in this very case. The Traction Company had to set aside ten million dollars as security for its obligation. It had to buy securities of some kind for this purpose. Can it be said that it must purchase bonds; that it cannot do what business men would ordinarily do under like circumstances; that it cannot buy stocks of the lessor company as long as those stocks do not enable it to control the company? Clearly the mere holding of stock for some purposes is not necessarily *ultra vires*. Whether *ultra vires* or not, depends upon the purposes of the acquisition. Moreover that which at one time is not *ultra vires* may become so. One corporation may innocently acquire a small interest in another corporation in payment of a debt, and may thereafter purchase an additional minority interest for the purpose of securing control. It cannot be doubted that the entire holding would become *ultra vires* and illegal in Illinois under such circumstances.

The supreme court in *People ex rel. v. Ch. Gas Tr. Co.*, 130 Ill. 268, 284, referring to insurance corporations which may find it necessary to keep funds on hand for the payment of losses, says: "But it is questionable whether even these can invest their surplus funds in the stocks of other corporations without special legislative authority."

And in *People v. Pullman Car Co.*, 175 Ill. 125, 159, they say: "That a corporation cannot become a stockholder in another corporation unless power to do so is specifically granted in its charter or necessarily implied from it."

While it would follow from these decisions that ordinarily in Illinois one corporation cannot acquire even a minority interest in another corporation, yet the court does not lay down an absolute rule to this effect which would control under the circumstances of this case.

The act of June, 1897, as amended by the act of May 11, 1903, demonstrates, however, that it is not against the public policy of Illinois for one street railway company to hold stock in another street railway company under certain circumstances.

In view of this legislative declaration and in the absence of an express decision to the contrary in this state and the conflict of authority in other states, in view of the necessity of making an investment as collateral security for the lease, it must be held that the corporation had the implied power to invest its funds, incident to the express power of acquiring a street railroad by lease and that the investment in these stocks, not having been made for the purpose of securing control and not directly tending to secure such control, was not illegal as against the public policy of Illinois or *ultra vires* as beyond the corporate power of the Traction Company.

But even if the *cestui que trust* could not legally hold the stock, it would not follow that the trustee, the stockholder of record, would, because of this, be debarred from voting it. The court adheres to the opinion heretofore rendered in *Dunbar v. Kellogg Switchboard Co.*,¹ that the corporation and the other stockholders are not concerned with the beneficial ownership in determining the right of a stockholder of record to vote.

In view of what has been said, it becomes unnecessary to determine whether the fact that the equitable rights have become vested in individuals, the receivers, revived the alleged suspended voting powers; or whether the complainants can be heard to urge these objections.

It must therefore be held on this record that the new or amended leases and agreement have been validly adopted and are in full force and effect if the original assumption that the act of 1855 (private laws, pp. 304, 305) enabled the underlying companies to become lessors and the Traction Company to become lessee. A want of power in either lessor or lessee would render the transaction null and void. *St. Louis R. R. Co. v. Terre Haute R. R.*, 145 U. S. 393.

The act of 1855, entitled "An act to enable railroad companies to enter into operative contracts and to borrow money," provides that all railroad companies incorporated or organized under the laws of this state shall have power to

¹ This case was reversed by the supreme court. See 224 Ill. 9 (Dec. 19, 1906).—Ed.

make such contracts and arrangements with each other and with railroad corporations of other states for leasing or running their roads or any part thereof.

No restriction is placed on the length of term. The entire road may be leased. If this can be done, there can be no objection to a lease of all the other property of the corporation even though its character changes from that of an operating to a mere leasing company. The underlying companies could therefore lawfully execute the leases as lessors.

In *Union Traction Co. v. City of Chicago*, 199 Ill. 484, 544, the court says, "The act of 1855 has reference to the making of contracts and arrangements between railroad companies already existing and in operation, for the leasing or running of their roads." Attention was directed to this sentence in a petition for rehearing containing a number of points. The petition was denied and the opinion remained unmodified. The statement, however, was purely incidental as was also the further statement on p. 545. "Indeed it is questionable whether appellant was properly organized for the purpose of leasing other railroads and terminating the performance of their duties to the public. Corporations, organized under the general incorporation act, may be formed in the manner provided by that act, for lawful purposes only. If, however, the leasing of other roads exclusively was a lawful purpose of appellant's organization, it certainly was obliged to operate such roads in accordance with the provisions of its own charter and not in violation thereof."

The point that the court was discussing and which it determined, was whether the lessee could get the benefit of certain privileges granted to the lessor. This depended on whether the lessor could operate under lessor's charter. The court held, that under its own charter, it lacked power to operate in accordance with lessor's charter and therefore it must, in operating, comply with its own charter and submit to council regulations.

It is urged that when the original lease was made, the lessee did not own, control or operate any road. But what standing in a court of equity has the complainant who on this

ground seeks to annul the second lease while at the same time he asks to have the original lease declared to be in full force.

Moreover, even though it be held that because the Traction Company was not an operating road on June 1, 1899, the lease when made was null and void and could have been repudiated by the lessors, yet if this lessee subsequently remedied this defect in its leasing power by acquiring and operating a road, the lease, not heretofore repudiated and subsequently recognized by both parties and all of their stockholders as in force, would become valid.

It is conceded that the company acquired and operated a certain extension under the city ordinances of June 4, and September 24, 1900. If the original leases are absolutely void then this extension belonged absolutely to the Traction Company so that it was enabled to execute a lease in July, 1903. That this instrument is or is called an amendment of the old lease which for the sake of the argument, may be assumed to be void, does not render it invalid. It is full and complete in itself, by virtue of the confirmation clause.

But even if the lessor companies have some interest in the extension constructed under these ordinances by virtue of the terms of the lease, nevertheless the essential fact remains that the Traction Company did become an operating company by its own act in seeking, obtaining and complying with the terms of these ordinances.

On the record before this court, it cannot be said that the Traction Company was organized solely for the purpose of leasing other roads; it cannot be held that it was not an operating road in 1900, if under the foregoing dicta, this is essential.

The court holds that the act of 1855 is not in conflict with the general incorporation act. It is therefore not expressly repealed. Repeals by implication are not favored. The supreme court moreover has assumed in the transfer cases that the act of 1855 is in full force. The court therefore further holds that it is not repealed by implication either by the general incorporation act or by the Allen bill.¹

¹ See Session Laws of 1897, pp. 282-285. This law was thereafter repealed. See Session Laws of 1899, p. 331.—ED.

A much earlier decision might have been rendered in the case in view of the fact that it is on a motion for a preliminary injunction. But the presentation of it was as complete as on a final hearing and the extremely able and exhaustive arguments of all of the counsel engaged in the case, as well as the importance of the questions involved, demanded and merited a careful consideration of all the facts presented and an examination of the authorities.

The motion for a preliminary injunction is overruled and the application denied

(Circuit Court of Cook County. In Chancery.)

James T. Soutter, et al.

vs.

**Ganie Felicite Lucile Marie Rose Belynde Ange D'Auxy,
et al.**

(March 7, 1898.)

1. **CITIZENSHIP—WHETHER NATIONAL OR STATE.** The right of citizenship as distinguished from alienage is a national right or condition, and pertains to the confederate sovereignty of the United States, and not to individual states.
2. **CONSTITUTIONAL LAW—WHETHER NATIONAL COMMON LAW.** The constitution of the United States presupposed the existence of the common law, and to a limited extent the principles of the common law prevail in the United States as a system of national jurisprudence.
3. **CITIZENSHIP—CHILD BORN OF FOREIGN PARENTS.** The rule that a child born in a foreign country is a citizen of the country of her parents, is one confined to countries which derive their jurisprudence from the civil law, and is not the rule in this country.
4. **CONSTITUTIONAL LAW—CITIZENSHIP—WHAT CONSTITUTES—CHILD BORN OF FOREIGN PARENTS.** The fourteenth amendment to the constitution of the United States provides that "all persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." Under this provision every person born within the dominion and

allegiance of the United States, whatever the nationality of his parents, is a natural born citizen of the United States.

5. SAME—CHILDREN OF AMBASSADORS, ETC., EXCEPTIONS TO RULE. This rule does not apply to children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence by a fiction of public law is regarded as a part of their country. Nor does the rule apply to persons born on a public vessel of a foreign country, while within the waters of the United States. The clause in the 14th amendment "subject to the jurisdiction of the United States" excludes all such persons from the operation of the general rule. Indians sustaining tribal relations are also excluded.

Bill for partition filed February 23, 1897. Gen. No. 167,422. Heard before Judge Murray F. Tuley. Decree September 14, 1898.

For statement of facts see opinion.

Hamlin, Holland & Boyden, solicitors for complainants.

Frederick F. Norcross, solicitor for defendant D'Auxy.

Frederick W. Burlingham, solicitor for defendant Theodore L. Frothingham.

TULEY, J.:—

This is a bill in partition. The two complainants bring this bill for partition making their half-sister, Ganie, party defendant.

The facts appear to be as follows: Lamar Soutter, a common ancestor and an American citizen, died March 16, 1893. Ganie, the defendant, was born in New York city, is now a minor upwards of ten years of age and has always lived in the state of New York. The father is Arthur le duc d'Auxy, a Belgian citizen, who has never been naturalized in the United States.

Complainants, by their bill, contend that Ganie is a non-resident alien, and could not inherit land in Illinois upon the death of Lamar Soutter in 1893. It was admitted that she is "a non-resident," within the meaning of the Illinois statute.

The question then involved is, whether she is an alien.

The Revised Statutes of Illinois, chapter 6, section 1, pro-

vide as follows: that, "a non-resident alien" * * * "shall not be capable of acquiring title to or taking or holding any land or real estate in this state by descent, devise, purchase, or otherwise."

It is a singular fact that the question whether a child born in the United States, whose parents are foreigners, residing in the United States (and not being ambassadors or ministers of foreign powers), is an alien or a citizen, has never been decided by the United States supreme court.

Prior to the adoption of the fourteenth amendment, which defines a national citizenship and distinguishes the same from state citizenship, the leading case upon the question of the citizenship of a child born of alien parents, residing in the United States, was that of *Bernard Lynch v. John Clarke and Julia Lynch*, found in 1st Sanford's Chancery Reports, page 583, in which it was held that Julia Lynch, born in the city of New York in 1819, of alien parents, during their temporary sojourn in that city, was a citizen of the United States.¹

The briefs of counsel and the opinion of the court contain all the law on the question involved that was to be found at that time. In that case the question as to the right of Julia Lynch to inherit turned upon the question of her alienage or citizenship. The learned chancellor there held the right of citizenship as distinguished from alienage is a national right or condition and pertains to the confederate sovereignty of the United States and not to individual states. At the time of that decision, whether there was such a thing as national citizenship except through state citizenship, was a question much debated and of difference of opinion; Calhoun and the followers of the state rights school, contended that there could only be national citizenship through state citizenship. But the learned chancellor in that case held that neither the common law nor the statute law of the state of New York could determine whether Julia was or was not an alien. He also held that the constitution of the United States, as well as those of the thirteen old states, presupposed the existence of the common law,

¹ The doctrine of *Lynch v. Clarke*, 1 Sandf. Ch. 583, has been followed in *United States v. Wong Kim Ark*, 169 U. S. 649.—Ed.

and that to a limited extent the principle of common law prevailed in the United States, as a system of national jurisprudence, and as there was no constitutional or congressional provision declaring citizenship by birth, it must be regulated by some rule of common law; that citizenship was purely a matter of national jurisprudence and not of state or municipal law, and adduces the law of the United States to be that children born here are citizens, without any regard to the political condition or allegiance of their parents, excepting, of course, children of ambassadors and ministers, who, in theory, are born within the allegiance of the sovereign power represented and do not fall within the rule.

The learned chancellor in that case considers at great length the contention that, by international or public law, the child so born was an alien for the reason that by that law the child follows the political condition of the parent, and suggests that such a rule might lead to the perpetuation of a race of aliens in our own country. He concludes that the rule contended for in that case, that the parents of Julia Lynch being foreigners, she took on the same character of alienage as her father, is one confined to countries which derive their jurisprudence from civil law and is more properly a rule of civil law than one of public law, or the law of nations, and that it was not and never had been the law of this country.

He also comments on the dual allegiance recognized by some writers on international law as attaching to a child born of aliens temporarily sojourning in the place of its birth, by which the child is held to be a native born citizen of the country of its birth, and, also, a subject of the nation to which its father owed allegiance, with a right to such child upon majority to choose of which country it will claim citizenship, and holds that even if such could be held to be the law of the United States, the inheritance being cast upon the child, Julia Lynch, during her minority, the place of her birth must govern and therefore that she could take the property as heir-at-law.

It is, however, contended that *Lynch v. Clarke*, is based upon the theory that the common law of England as it existed at the time of the revolution became the common law of the

United States, and that the chancellor was in error in that regard, as there is not and never has been any national common law of the United States.

This question also has never been directly decided by the supreme court of the United States, but is now pending there in a case which went up from this judicial district.¹

It is, however, not necessary to rely entirely upon *Lynch v. Clarke*, as in the opinion of this court the 14th amendment to the United States constitution establishes and declares what shall constitute national citizenship.

Whatever may have been the rule as to what constituted national citizenship prior to the adoption of the 14th amendment, it was within the power of the United States by amendment of the constitution, or otherwise, to legislate upon that subject, as, in the view of international law, all sovereign states are and must be equal in rights, and, therefore, each competent for itself to determine what shall constitute citizenship.

The effect of the 14th amendment as to the citizenship of a child born in the United States of alien parents, temporarily residing here, has never been directly passed upon by the supreme court of the United States.

The 14th amendment declares that "all persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." * * *

The leading case on the question of citizenship of a person born in the United States since the adoption of the 14th

¹ The case referred to is doubtless *United States v. Wong Kim Ark*, 169 U. S. 649, decided March 28, 1898, although that case did not go up from this judicial district. It was there held that the provision of the fourteenth amendment to the constitution in regard to citizenship must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, dissented and held (p. 709) that there is no common law of the United States, nor has there ever been. The question as to whether there is a body of national common law has since been decided in *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92.—Ed.

amendment of the constitution, is that of *In re Look Tin Sing*, on *habeas corpus*, before the United States court. Justices Field, Sawyer and Sabin, found in the 21st Fed. page 905, opinion by Justice Field, in which he held that "independently of the constitutional provision (that is, the 14th amendment), it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves, and their descendants, that birth within the dominions and jurisdiction of the United States of itself creates citizenship." He refers to the above opinion of Assistant Vice-Chancellor Sandford in *Lynch v. Clarke*, and says that the chancellor after an exhaustive examination of the law, said "that he entertained no doubt that every person born within the dominion and allegiance of the United States, whatever the situation of his parents, was a natural born citizen and added that this was the general understanding of the legal profession and the universal impression of the public mind. In illustration of this general understanding, he mentions the fact that when at an election an inquiry was made whether the person offering to vote is a citizen or an alien, if he answers that he is a native of this country, the answer is received as conclusive that he is a citizen; that no one inquires further; no one asks whether his parents were citizens or foreigners. It is enough that he was born here, whatever was the status of his parents." And in the case of Look Tin Sing the learned Justice Field construed the 14th amendment and declared that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside."

In that case Look Tin Sing was the son of Chinese parents, was born in California and had been sent to China for the purpose of being educated, and on his return, he was forbidden to land because of what is known as the Chinese Exclusion Act.

Justice Field says, "This language (of the 14th amendment) would seem to be sufficiently broad to cover the case of the petitioner. He is a person born in the United States. Any doubt on the subject, if there can be any, must arise out

of the words, 'subject to the jurisdiction thereof.' They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them when obedience can be rendered; and only those thus subject by their birth, or naturalization, are within the terms of the amendment. The jurisdiction over these latter must, at the time, be both actual and exclusive. The words mentioned except from citizenship, children born in the United States, of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors whose residence, by a fiction of public law, is regarded as part of their own country." Also that "persons born on a public vessel of a foreign country, while within the waters of the United States, and consequently within their territorial jurisdiction, are also excepted. They are considered as born in the country to which the vessel belongs. In the sense of public law they are not born within the jurisdiction of the United States. The language used has also a more extended purpose. It was designed to except from citizenship persons who, though born or naturalized in the United States, have renounced their allegiance to our government, and thus dissolved their political connection with the country. The United States recognized the right of every one to expatriate himself and choose another country." * * * "The English doctrine of perpetual and unchangeable allegiance to the government of one's birth attending the subject wherever he goes, has never taken root in this country, although there are judicial *dicta* that a citizen can not renounce his allegiance to the United States without the permission of the government under regulations prescribed by law, and this would seem to have been the opinion of Chancellor Kent, when he published his commentaries. But a different doctrine prevails now." And proceeding he declares, "The clause as to citizenship was inserted in the amendment not merely as an authoritative declaration of the generally recognized law of the country, so far as the white race is concerned, but also to overrule the doctrine of the Dred Scott case, affirming that persons of the

African race brought to this country and sold as slaves, and their descendants, were not citizens of the United States, nor capable of becoming such." (19 How. 393.) And concluded by holding, "No citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of congress." (Among the exceptions may also be mentioned, Indians sustaining tribal relations.)¹

In what is known as the Slaughter House cases, in the 16th Wall., United States Report, 36, 73, Justice Miller, who delivered the opinion of the supreme court, in construing the clause in the 14th amendment referred to, remarks: "That the phrase 'subject to the jurisdiction thereof' was intended to exclude from its operation, children of ministers, consuls, and citizens or subjects of foreign states, born within the United States. The question in issue in that case was not as to the status of children born in the United States whose parents were subjects of foreign states and it was not necessary to the decision of the case before the court to decide that question." In the late American and English Encyclopedia of the Law, 6th volume, new series, this is referred to as a mere *dictum* of Judge Miller, and "that it must be modified in view of the decision in the case of Look Tin Sing, decided by Mr. Justice Field, and other decision which have followed Judge Field's ruling, the latest among which appears to be *In re Wong Kim Ark*, 71 Fed. 382."

I can not but regard the case of *Lynch v. Clarke*, and the case of Look Tin Sing, decided by Justice Field, as correctly laying down the law which should govern this case. I am of opinion that there can be no reasonable doubt but that under the clause quoted of the 14th amendment, that a child born of foreign parents, residing in the United States, not coming

¹ The decision in *In re Look Tin Sing*, 21 Fed. 905, has been cited and approved in the following cases: *In re Sun Hung*, 24 Fed. 723, 725; *Ex parte Chin King*, 35 Fed. 355, 356; *In re Yung Sing Hee*, 36 Fed. 437, 438; *In re Wy Shing*, 36 Fed. 553, 554; *In re Wong Kim Ark*, 71 Fed. 382, 385, 386, 389, 391, aff. 169 U. S. 649; *In re Rodriguez*, 81 Fed. 337, 352.—Ed.

within the exceptions as to children of resident ministers and ambassadors, and Indians sustaining tribal relations, must be held by reason of their birth alone within the United States, to be natural born citizens of the United States.

A decree may be prepared accordingly.¹

(Circuit Court of Cook County. In Chancery.)

George W. Korn, et al.

vs.

Edith Sears, et al.

Edith Sears.

vs.

George W. Korn, et al.

(August 5, 1897.)

1. TRUSTS—WHETHER ACTIVE OR PASSIVE. A *passive* trust exists as where land is conveyed to A in trust for B without any power to take actual possession of the land or to exercise acts of ownership over it. *Active* trusts exist where the trustee is charged with the performance of active and special duties in respect to the management of the trust property.
2. SAME—WHERE TRUSTEE HAS MANAGEMENT OF PROPERTY—STATUTE OF USES. Where trustees are empowered by will to conduct and manage an estate for the benefit of testator's wife and child, this constitutes an *active* trust, and the statute of uses does not vest the legal title in the *cestui que trustent*.
3. CONVEYANCE ACT—APPLICATION TO EQUITABLE ESTATES. Section 13 of the conveyance act which dispenses with the word "heirs" in the granting of estates, applies to both legal and equitable estates.
4. EQUITABLE ESTATES—WHAT CONSTITUTES. An equitable estate only exists where the *cestui que use*, or the beneficial owner, has a right to demand an immediate conveyance of the legal title.

¹ The decision of Judge Tuley has since been affirmed in principle by the United States supreme court in *United States v. Wong Kim Ark*, 169 U. S. 649.—Ed.

5. **EQUITABLE ESTATE—IN CASE OF ACTIVE TRUST.** Where a trustee has the right to take possession and exercise active ownership over the property, the trust is an active trust, and the estate of the *cestui que trust* is not an equitable estate, because the beneficiary has no right to compel or demand the immediate transfer of the *legal* estate.
6. **TRUSTS—NATURE OF BENEFICIARIES' ESTATE.** A conveyance to trustees in trust for the "wife and child" of the testator is presumed to be a conveyance in fee simple in the beneficial use of the property for the maintenance and support of such beneficiaries.
7. **TRUSTS—FOR SUPPORT AND MAINTENANCE OF TESTATOR'S FAMILY—HOW LONG TO CONTINUE.** A conveyance to trustees for the maintenance and support of the "wife and child" of the testator will continue only so long as the child remains such. When such child arrives of age, the trust would cease. The same situation would exist where the child dies before becoming of age.
8. **TRUSTS—BENEFICIARIES—JOINT OR SEVERAL.** Where a trust estate is created for the benefit of a wife and child, it will be considered that it was created for their joint benefit. If therefore the trust ceases as to one beneficiary it would cease as to both.
9. **SAME—NATURE OF BENEFICIARIES' ESTATE.** Upon the determination of such an estate the beneficiaries would become tenants in common.

Bill for construction of will creating a trust. Cross-bill by one of the beneficiaries to declare trust provisions of will null and void. Heard on demurrer to cross-bill before Judge Murray F. Tuley.

For statement of facts see opinion.

Franklin Denison and *F. H. Trude*, for complainant in original bill.

Pope & Small, for defendants and cross complainant.

TULEY, J:—

The question arising on the cross-bill and raised by the demurrer is as to the construction of the will of Edmund B. Sears.

This will is very short and the clause in question is as follows: "Second: After the payment of such funeral expenses

and debts, I give, devise and bequeath to George W. Korn, George Sealey and Herbert B. Johnson, all of my personal property, stock and interest in my business in the Henry Sears Company, and also all my real estate, as trustees, for the use of my wife and child. Said trustees I hereby appoint to manage and conduct my estate to their best judgment, continuing or closing out my interest in the Henry Sears Company as to them seems best, also continuing my interest in the real estate or selling them out as to them seems best.'"

Under this will the trustees took possession of the personal and real property and have been carrying on the business of the Henry Sears Company.

The will was made a few weeks before the death of the deceased on the 26th day of May, 1894.

The cross-bill is filed by Edith Sears, the widow, against the trustees and Paul H. Sears, the infant.

The cross complainant contends that the trust created by the will is a dry trust and not an active trust, and being a dry trust, it is immediately executed by virtue of the statute of uses.

The distinction between dry or passive trusts and active trusts is well defined in Pomeroy's Equity Jurisprudence, section 153: "An express private passive trust exists where land is conveyed to or held by A in trust for B, without any power expressly or impliedly given to A to take the actual possession of the land, or to exercise acts of ownership over it, except by the direction of B. The naked legal title only is vested in A, while the equitable estate of the *cestui que trust* is, to all intents, the beneficial ownership, virtually equivalent in equity to the corresponding legal estate. Express private active, or, as they are sometimes called, special trusts, are those in which, either from the express directions of the written instrument declaring the trust, or from the express verbal directions, when the trust is not declared in writing, or from the very nature of the trust itself, the trustees are charged with the performance of active and substantial duties in respect to the management of and dealing with the trust property, for the benefit of the *cestuis que trustent*." * * *

"In this class, the interest of the trustee is not a mere naked legal title and that of the *cestui que trust* is not the real ownership of the subject matter."

It is true that in the clause of the will referred to there is no express requirement that the trustee shall take possession of the real and personal property, but it is clear that the power is impliedly given to the trustees to take possession and exercise acts of ownership over the real and personal property. The language of the will, "I appoint said trustees to manage and control," is, in my opinion, equivalent to a direct charge to the trustees to manage and control; therefore, it became an express active trust and the legal title to the real and personal property passed by the will to the trustees in trust for the wife and child. It is not a case coming within the operation of the statute of uses so as to vest the legal title in the *cestuis que trustent*.

Another point raised is that an equitable estate in fee passed to Mrs. Sears and her son and their heirs under the provision of the thirteenth section of the conveyance act, which provides: "Every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law."

This raises the question as to whether the statute dispensing with the word "heirs" in order to transfer an estate in fee simple, applies to equitable estates as well as legal estates. I should feel inclined to hold that it did, but the question arises, is this an equitable estate in Mrs. Sears and her son? The equitable estate exists only where the *cestui que use*, or the beneficial owner, has a right to demand an immediate conveyance of the legal title. In a passive trust, as where conveyance is made to A in trust for B, without any limitation or specification as to the duties of the trustee, or if the purposes of the trust were specified and had afterward been fulfilled, there would be a complete equitable estate in B, and he would have a right, independent of the statute of uses, to demand a

conveyance of the legal title; but where there are active duties to perform and the trustee expressly or impliedly has a right to take possession and exercise active ownership over the property or to take possession and sell the same, the trust is an active trust and the estate of the *cestui que trust* is not an equitable estate, because the *cestui que use* or beneficiary has no right to compel or demand the immediate transfer of the legal estate.

He has a right to compel the performance of the trust while it lasts, according to its terms and intent, but has no right to a conveyance of the legal title. Therefore, while he has an equitable right or interest in the property, a right to the beneficial use of the property, he has no complete equitable estate in the property.

The question, underlying this will, as it does all others, is to ascertain the intent of the testator. It will be noticed that the wife and child are not named except as "my wife and child." The testator evidently referred to them as constituting his family and it was clearly his intent that the trustee should control his property, real and personal, for the use and benefit of his family; he had in view their support and maintenance. No presumption can arise that he intended this trust to continue for all time to come for the benefit of his wife and child and their heirs. If such a construction could be placed upon the will, it would be obnoxious to the rule against perpetuities, for such an equitable interest or estate can no more be made the subject of a perpetual trust than can a legal estate be made the subject of a trust in perpetuity.

There can be no question that he does not limit the beneficial estate given to his wife and child by express words, nor does he employ any language from which a less estate than the fee simple would be implied. There is no limitation for life, there is no direction to the trustees as to what is to be done with the property after the death of his wife and child, nor is there any direction that only the income shall be appropriated to the support or to the use of the wife and child.

If he had intended that they should have less than a fee simple in the beneficial use of this property, it is fair to presume that he would have so declared his intention.

The word "use" must be construed in its broadest sense, and that is that all the beneficial use of the property during the existence of the trust, and that the property itself was to belong to the wife and child in fee simple, after the purposes and objects of the trusts had been carried out. If he intended, as I have held he did, that the trustee should manage this property and devote it to the support and maintenance of his wife and child, the presumption of law will arise that he intended the trust to continue only so long as the child remained a child; also that one reason for the making of the trust was, that the child, being an infant, was unable to manage his own property. When the child arrives of age, and ceases to be a child in the eye of the law, in my opinion, the trust would cease, for the trust was for the benefit of the wife and child jointly, and not separately. It was for their joint benefit, as his remaining family, and when it ceases as to one it would cease as to both of the beneficiaries. If the child died before coming of age, it would cease; on the child becoming of age it would cease, both as to the widow and the child, and *eo instanti*, the child becoming of age, it would become a dry or passive trust, and would vest, by virtue of the statute of uses, the legal title in the mother and the child.

In the case of *Dean v. Long*, 122 Ill. 447, there was a trust, for a married woman and her children, without other words as to the nature of the trust or the duties of the trustees. In that case the court held that the wife did not take a life estate with remainder over to her children, but that there was a joint estate in her and her children, which would open up and let in subsequently born children.

Upon the trust ceasing, the wife and child both living, under the decisions referred to, would take the estate in joint tenancy, but under our statute of 1874, doing away with joint tenancy, they would become tenants in common of the estate.

The cross-bill seeks relief upon the ground that the trust provisions of the will are absolutely null, void and of no effect. It can not be maintained upon that theory.

The demurrer of the defendant in the cross-bill must be sustained with leave to the complainant to amend if she so desires, so as to pray for an accounting of their doings as trus-

tees under the will, or for other relief, not inconsistent with this opinion.

NOTE

In the recent case of *Mason v. Mason*, 219 Ill. 609, it was held that where the trustee holds the legal title for the benefit of the *cestui que trust* for life, with power to sell the land and loan, or re-invest the proceeds and pay over the income to the *cestui que trust* at such times as the trustee may deem best, the trust is an active one, and is not executed by the statute of uses.

(Circuit Court of Cook County.)

Building Trades Council

vs.

Board of Education of the City of Chicago.

(March 12, 1898.)

1. **CONTRACTS—UNION LABOR.** A private individual has the undoubted right to insert in his agreements that none but union labor shall be employed in carrying out the contract.
2. **SAME—BOARD OF EDUCATION.** The board of education being public officials cannot insert such a stipulation in its contract from mere sentiment or caprice, unless such action would subserve the public interests.
3. **SAME—PUBLIC POLICY.** If the board should decide that it is to the public interest to insert in its contracts that none but union labor should be employed, or if the board should provide that none but union workmen should be employed upon the pay-roll of the board, no one can complain.
4. **ARBITRATION.** There is no such legal "controversy" between the parties upon the above facts as is contemplated by the act under which the submission is made.

Submission to Judge Murray F. Tuley under act of June 17, 1887. Gen. No. 182,260.

For statement of facts see opinion.

McMahon & Cheney, for complainant.

Donald L. Morrill, for defendant.

TULEY, J.:—

The questions submitted are: Whether the board of education of the City of Chicago has "the right to insert in all con-

tracts and specifications connected therewith the provision that none but union labor shall be employed in any part of the work where said work is classified under any 'existing union,' " and

Second, whether said board of education has the right to enforce a rule whereby "none but union workmen shall be employed and placed upon the payroll of the board."

Waiving for the present the question whether this is "a controversy," within the meaning of "the act to prevent delay in the administration of justice," I will give my judgment upon the points involved, as I agreed to do upon the said submission being made.

There would be no question raised if the contracts or payrolls in question were those of a private individual, as to his right to provide for the employment of union labor only. A private individual has the undoubted right to put any such provision in any contract that he may make, or he may put in a provision that no union labor shall be employed in carrying on the contract. He may insert either provision that he wishes, at a loss to himself, or from mere sentiment, or caprice. The law recognizes the right of an individual to do what he will with his own in that regard. There can be no doubt but that under certain circumstances the board of education might insert in its contracts a provision for the employment of none but union labor, or provision that no union labor should be employed, but, being public officials, charged with the duties of a public trust, the members of the board could not act, knowingly, at a loss to the public funds, or from mere sentiment or caprice, or from any motive other than to subserve the public interests and to faithfully discharge the public trust confided to them.

If the board should find that the skilled labor of the country was practically organized into "unions," whose members refused to work with non-unionists, that unless a clause requiring all work to be done by "union" labor be inserted, there will probably be "strikes" upon the work, causing delay, loss and trouble incident to strikes, and if it should find that by reason of the situation confronting the board, it would

be wise and prudent to insert such provision, or, in other words, if the board should, in the discharge of their public trust, be honestly of the opinion, after due investigation, that the public interests, both as to economy in the construction of the work, and the character of the work done would be best subserved by the insertion of the union labor clause in the contracts, it would clearly have the right and it would be its duty to insert such a provision.

There can in my opinion be no doubt of the legality of the union labor clause, nor as to the rule as to placing none but unionists upon the payroll, if the board should be of the opinion that the public interests would be best promoted thereby. The propriety of so doing, or the justification of so doing, is a question solely for the board to decide. They must decide as to the proper performance of their duties and the proper discharge of the trust imposed upon them.

It is urged, however, that the board of education being a public agency, and the work in question being work which is for the benefit of the public, that it is against public policy that the board of education should discriminate as between "union" and "non-union" labor. Be that as it may, it is not for the board of education to decide, or to be guided by what it believes to be the best public policy. It is for the state legislature to determine questions of public policy. The board of education has no legislative duties to perform in connection with the carrying out of its public works, and in the absence of limitations or restrictions imposed by the state legislature, it must perform its duties and discharge its trust with a view solely to the best interests of the public, having regard to economy in the construction of the work contracted for and the quality of the work to be done.

In my opinion, however, there is no such legal "controversy" between the parties to this submission, the board of education and the building trades council, such as is contemplated by the act under which this submission is made. Certainly no *mandamus* would lie against the board of education to make it insert in its contract a "union labor" or a "non-union labor" clause, and there is no agreement between

the board and the Building Trades Council which the latter could file a bill to enforce the specific performance of. In other words, there is no controversy between these parties within the purview of the act in question.

The submission made to the court will therefore be dismissed for that reason.

(Criminal Court of Cook County.)

People of the State of Illinois

vs.

William Loeffler, et al.

(July 14, 1905.)

1. **PUBLIC RECORDS, WHEN SUBJECTS OF FORGERY.** A public record or other authenticated matter of a public nature, to be the subject of forgery must be one that affects a pecuniary demand or obligation, or property right; and this must be manifest on the face of the document itself, or by averment in the indictment of extrinsic facts which show that it is of such a character.
2. **FORGERY—INSTRUMENT FORGED MUST BE ADMISSIBLE IN EVIDENCE.** To be the subject of forgery the instrument must be admissible in evidence, but the converse of the proposition does not follow that any instrument which is admissible in evidence for any purpose may be the subject of forgery.
3. **CITIES AND VILLAGES—CAN GRANT FRANCHISE ON STREETS ONLY BY ORDINANCE.** The charter of the city of Chicago (city and village act) is silent as to the mode in which the council may grant a franchise for the use of the streets, but such a franchise cannot be conferred by a mere resolution of the council but must be by ordinance on the passage of which the yeas and nays must be taken, which must receive a majority vote of all the members elect of the council, be submitted to the mayor for his approval, and be transcribed upon the records of the city.
4. **FORGERY—PUBLIC RECORDS—MUST AFFECT PROPERTY RIGHTS.** The alteration of the public record in question could not constitute forgery since it did not affect any property right.
5. Defendants were indicted for forgery for altering certain proceedings in the city council of Chicago, the proceedings in

question containing a report by the commissioner of public works, followed by the words: "Placed on file;" these words were alleged to have been altered to read, "Which was by motion of Ald. Novak (8th ward) duly approved and placed on file." *Held* that this did not constitute forgery, and that a verdict of not guilty must be ordered.

Indictment for forgery heard before Judge Arthur H. Chetlain. After the close of the state's case a motion was made to find for the defendants.

Statement of facts.

The defendants William Loeffler, Edward J. Novak, A. G. Wheeler, Edward Ehrhorn and James Higgins, were indicted under sec. 105 of the criminal code, for altering certain proceedings of the city council of Chicago. The proceedings in question contained a report by the commissioner of public works, followed by the words: "Placed on file," and the evidence adduced by the prosecution tended to show, and the court on this motion assumed that it did show, that the defendants or some of them had changed the record by substituting for these words the following: "Which was, on motion of Ald. Novak (8th ward) duly approved and placed on file." The motion was sustained and a verdict of not guilty was ordered and returned.

John J. Healy, state's attorney, *Harry Olsen* and *E. C. Lindley*, assistant state's attorneys, for the people of the state of Illinois.

Nathaniel C. Sears, *Moritz Rosenthal* and *Wm. S. Forrest*, for defendants.

CHETLAIN, J.:—

The forgery charge was the insertion after the words "which was" and before the words "placed on file" of the words "on motion of Ald. Novak (8th ward), duly approved;" so that it read "which was on motion of Ald. Novak, 8th ward, duly approved and placed on file." A public record or other authenticated matter of a public nature to be the subject of forgery must be one that affects a pecuniary demand or obligation, or property right; and this must be manifest on the face

of the document itself, or by averment in the indictment of extrinsic facts which show that it is of such a character. According to the decided weight of authority in this country, when a document does not, on its face, purport to affect a pecuniary interest or property right, the indictment is bad, unless it sets up facts to show just how such a document does affect a pecuniary interest or property right or facts from which the court may judicially see that it has some such apparent legal effect. It is true if the document were a bond, bill, promissory note, deed or demand for money, the law would imply the injury to a pecuniary interest or property right.

The document in question here is not one which on its face purports to affect a property demand or obligation, or property right. Considered by itself alone, there is nothing to indicate that it has any such effect or tendency, or that it has the apparent legal capacity to prejudice the rights of the city or the public, or that it purports to create a liability or obligation, or to work injury to any one. It is contended by the state's attorney that a false making and the intent to defraud are the only two essential elements to constitute forgery; and that it is sufficient if the instrument has the mere show or appearance of fraud, or might by any possibility be used to defraud. Such is not the law in this state.

The specific enumeration of various instruments in the statutory definition of the crime, and the history of their insertion at various times, of which the court takes judicial cognizance, attest the contrary.

It is further contended that any instrument which is admissible in evidence for any purpose may be the subject of forgery. In support of this proposition no authorities were cited. To be the subject of forgery the instrument must be admissible in evidence; but the converse of the proposition does not follow.

I am of the opinion that sufficient extrinsic facts are not averred in the indictment to make it operative. It fails to aver that others relied on the forged record and purchased securities of the Tunnel Company, and that moneys were invested

on the strength of the forged document, and that any conduits or tunnels were built after February 5, 1900. The evidence, it is true, so shows; but to this the well-known rule of pleading applies that proof without allegations is as fatal as allegations without proof. The failure to include these averments makes the indictment bad. In this connection it becomes material to inquire whether the council's approval of the McGann report, if made, was needed or effective for any purpose. The State's Attorney claims that the action of the council on the McGann report had the effect of a resolution approving the granting of the permits for tunnels, the work done thereunder, and of the company's plans on file for future tunnel construction, which estopped the city from denying the company's rights.

By the ordinance of February 20, 1899, in evidence, a grant was given to the Illinois Telephone & Telegraph Company to construct, maintain, repair and operate in all of the streets, avenues, alleys and other places in the city of Chicago a line or lines of conduits and wires to be used for the transmission of sound signals and intelligence, by means of electricity or otherwise, which should be laid and access thereto be had from the surface, and not from a tunnel beneath the surface. It appears from the evidence, which, for the purpose of this motion, the court must assume to be true, that the Telegraph Company, knowingly intending to defraud the city, in plain violation of the letter and spirit of the ordinance, prepared and filed plans with the commissioner of public works for constructing a tunnel of extensive dimensions thirty feet below the surface in all the streets, avenues, alleys and public places in the business district of the city, and obtained permits for tunnel construction.

January 29, 1900, the Hermann resolution was introduced in the council requesting a report from the commissioner of public works as to the work done under the ordinance, and for his opinion as to whether it was within the fair letter and spirit of the same. The report of the commissioner of public works, accompanied by the tunnel's plans and copies of the permits granted, were submitted to the council and action

thereon was taken by the council placing the same on file. This action appeared in the printed pamphlet of the council proceedings. The indictment charges that after July 20, 1900, the printed pamphlet, showing the action aforesaid, constituted the official record, and was forged by making it appear that the report of the commissioner of public works, on motion of Alderman Novak, was duly approved and placed on file; it appears from the evidence that the company, relying on the affirmative action of the council, as shown by said printed pamphlet, invested hundreds of thousands of dollars in tunnel construction and built miles of tunnel; and that thereby the city became estopped to deny the rights of the company to its tunnels and conduits as constructed.

I am at a loss to perceive how the action of the council, had it been taken, merely approving the report of the commissioner of public works, who was an agent of the city, reporting to his principal, can have such an effect or afford the basis for an estoppel in *pais*, or operate as a consent of the council, or as a ratification of what had been done. The forged report of the council's action did not in express terms, nor purport, to approve the permits granted, the plans submitted, nor the opinion of the commissioner that the work was within the letter and spirit of the ordinance. The council's action in approving the report at most would be but the expression of a wrong opinion, not binding on the city.

Where so important a franchise is involved it does not seem reasonable to hold that a grant may be conferred by the mere approval of such a report. It would be a dangerous doctrine to so assert, one fraught with evil consequences. It must be remembered too that the company was not a party to this transaction. I am of the opinion that whatever the effect of the forged document might be, the company that had knowingly prepared plans, secured permits, and constructed its tunnel in plain violation of the ordinance, with the evident purpose to obtain a subway monopoly and thereby defraud the city, would be estopped from asserting the doctrine of estoppel, or of consent or of ratification or of claiming that it had acquired rights by the council's construction of its ordinance.

Under these circumstances the city would not be estopped to deny to the wrong-doer the fruits of his wrong-doing. Right and justice would not require it.

The charter is silent as to the mode in which the council may grant a franchise of this kind. But in view of the subject matter, the large source of revenue that may be exacted by the city for the use of its streets, the various public grants for the uses that already exist in its streets, and the necessity for their proper regulation; in view of the vastness of the interest involved, the liabilities imposed, and the acts and provisions therein, and of the fact that the provision of such an ordinance have a continuing force and effect; I am of the opinion that such a grant is a legislative act of the highest order and that it cannot be conferred by a mere resolution of the council, but must be embodied in the permanent form of an ordinance, on the passage of which the yeas and nays must be taken, which must receive a majority vote of all the members elect of the council, be submitted to the mayor for his approval and transcribed upon the records of the city.

I am aware of the case in the 208th Illinois which counsel urge, with great show of reason, should be conclusive of the question here involved. (*Village of London Mills v. White*, 208 Ill. 289.)

What was said in that case must be taken in connection with the facts in the case. The grant there was for the erection of telegraph poles in a small town; and the court, in giving its reasons for its decision, said, that "There was nothing upon which a veto could operate in that instance." It is asserted that the action of the council adopting the McGann report operated as a resolution conferring upon the company the right to tunnel its conduits. If it had that effect, it clearly modified or enlarged the original grant. Whether it had that effect or not, it was a mere nullity, because the law is well settled that an ordinance can only be amended, altered, modified or enlarged by an act of equal dignity.

For the reasons given I am of the opinion that the forged document in question was null and void, wholly inoperative and could not afford the basis for an estoppel in *pais*, nor

operate as a consent, or as a ratification by the city of the act of the company.

Counsel for the defendant urged that from the allegations of the indictment and the evidence it appears that as to the defendant William Loeffler no crime is charged, because it appears that he is charged with forging his own record; and that his co-defendants stand in a relation to him, in law, which renders the indictment fatal also as to them. Owing to the necessity for immediate decision and want of time I have been unable to fully consider this question; nor is it necessary.

For the above reasons the court is constrained to direct a verdict of not guilty as to all of the defendants.

NOTE.—A motion to quash the indictments in the above cases was made in 1905 before Judge Tuthill in the criminal court of Cook county, and the motion denied, Judge Tuthill rendering a decision that the indictments were good. The case then came up for trial before Judge Chetlain. The decision of Judge Tuthill follows. *People v., Wheeler*, 1 Ill. C. C. 387.—Ed.

(Criminal Court of Cook County.)

People of the State of Illinois

vs.

Arthur G. Wheeler, et al.

People of the State of Illinois

vs.

Novak, et al.

(March, 1905.)

FORGERY—ALTERATION OF PROCEEDINGS OF CITY COUNCIL. The defendants were indicted under the statute of Illinois for forgery for altering the printed records of the city council of Chicago in reference to its action on a certain report of the commissioner of public works relating to the construction of certain tunnels and conduits of the Illinois Telephone and Telegraph Company. The report was in fact ordered by said city council to be "placed on file" but the printed record of the city

council was changed so as to read "which was on motion of Ald. Novak (8th ward) *duly approved* and placed on file." *Held* that this constituted a forgery of a record or other authentic matter of a public nature by which a pecuniary demand or obligation or a right in property is or purports to be created, conveyed, transferred, diminished or destroyed with intent to damage and defraud some person, body politic or corporate, constituting the statutory crime of forgery.

Indictments for forgery and perjury. Motion to quash the indictments. Heard before Judge Richard S. Tuthill.

For statement of facts see opinion.

John J. Healy, state's attorney, *Harry Olsen* and *E. C. Lindley*, assistant state's attorneys, for the people.

Levy Mayer, *Nathaniel C. Sears* and *A. S. Trude*, for the defendants.

TUTHILL, J.:—

The question here involved is one of strict law. Its consideration and determination is based upon the facts set out in the indictment, which are to be taken as true. The court is not permitted to have in mind or to surmise any different statement of facts than that found in the indictment.

The city council of the city of Chicago, February 20, 1899, enacted an ordinance granting a valuable franchise, in and under the public streets of the city of Chicago, to the Illinois Telephone and Telegraph Company, which, being duly approved by the mayor and accepted by the corporation, became a law of the city, and at the same time a valid contract between the city and said corporation. This ordinance gave to the said corporation authority to construct, etc., in the streets and public places of the city "a line or lines of conduits and wires or other electrical conductors," to be used for the transmission of sounds, signals and intelligence, by means of electricity or otherwise. It requires that such conduits should be placed under ground in the main portion of the city.

It gave to the mayor the authority to designate in what streets conduits might be laid and required the company to "at all times place and keep on file with the commissioner of public works plans showing the location of each conduit laid,"

and that no conduits should be laid without first obtaining a permit from the commissioner of public works. The ordinance further provided that before opening any street for the purpose of laying, repairing or removing conduits said company should obtain "from the commissioner of public works a permit therefor in accordance with the conditions and requirements in this ordinance."

The indictment sets out the ordinance in full and alleges that there were on file with the commissioner of public works plans showing certain streets, etc., under and in which said company proposes to construct its conduits which the company had, pursuant to the terms of said ordinance, filed with said commissioner; which said plans, it is alleged, on the 6th day of December, 1899, were "approved by one John Erickson, city engineer;" that on the 8th day of December, 1899, "pursuant to the terms of said ordinance there was issued to the said company a permit, which permit authorized said company "to construct by *tunneling* its conduits under the ordinance aforesaid." This permit is set out in the indictment. It gave the right to tunnel, "proceeding from a shaft already constructed in the rear of 170 Madison street, and from other shafts for which said permits may be issued." It reserves the right to the city engineer to appoint such engineers and inspectors as he may deem necessary for the proper supervision of the work and to protect the city's interests, but provided that the conduits constructed should be used for no other purpose than the stringing therein of wires, etc., "to be used for the transmission of sound, signals and intelligence in accordance with the ordinance." It is then stated that the said company "assuming to act under the authority conferred in and by said ordinance and said permit and prior to the fifth day of February * * * did construct a conduit tunnel or subway of great length to-wit, of the length of 560 feet, and of great height, to-wit, of the height of seven feet six inches, and of great width, to-wit, six feet wide, and of great depth under the streets, to-wit, to the depth of twenty-five feet below the surface," etc.

The indictment then alleges that on the 29th day of Janu-

ary, 1900, there was duly adopted a certain resolution on motion of Alderman Hermann, which was as follows:

“Whereas, It is currently reported that the Illinois Telephone and Telegraph Company is constructing a costly conduit system under the streets of the city so large that it would interfere with other or different use of the streets should it hereafter be desired by the city so to use it, and so extensive as to be a violation of the letter and spirit of the ordinance upon which their rights depend, and to be wholly unnecessary for any legitimate necessity of the telephone business, therefore be it

Resolved, That the commissioner of public works be requested to inform this council what permits have been issued to the said company for the doing of work in the streets of this city and under what authority each of said permits has been issued; and

Resolved, further, That said commissioner be requested to report to this council what work is being done by said company in said streets, and whether and how far the work done, in his opinion is within the fair letter and spirit of the ordinance of said company.

It is then further stated that on the fifth day of February, 1900, said commissioner of public works submitted to the council in writing the report called for by the said resolution, which said report is set out in full in the indictment. It gave the information asked as to the character of the work done, as to the permits under which said work had been done and set out in full the permits.

The commissioner of public works informed the council that “The city electrician assures me that the space is not more than is absolutely necessary to accommodate the business to be transacted by the Illinois Telephone and Telegraph Company under the plan and scope presented by the president of that company and for the accommodation of such wires as the city may need for lighting and telegraph purposes, as they are authorized to use them under the said ordinance. The conduit is being constructed at a point twenty-five feet below the surface.” He further states to the coun-

cil, "The work is progressing with very little inconvenience to the general public and I believe is fully within the fair letter and spirit of the ordinance," etc.

The indictment states that this report was then and there ordered by the said city council placed on the file, and was by said city council of said city of Chicago published as a part of its official proceedings, and then and there became and was an official record of said city council of said city of Chicago of its said proceedings on the fifth day of February, 1900, and then and there became a record of a public nature.

I am of the opinion that it was such.

It is thereafter in said indictment alleged with all needed particularity that the defendants did "feloniously, fraudulently, unlawfully, knowingly, wilfully and falsely alter the said true and genuine record of a public nature aforesaid * * * by inserting after the words 'which was' and before the words 'placed on file' the other words, 'on motion of Ald. Novak (8th ward) duly approved and,' " making the action of the council to read in these words: "which was on motion of Ald. Novak (8th ward) duly approved and placed on file."

It is maintained by the state that these facts alleged in the indictment constitute the crime of forgery. The learned counsel for the defendants maintain that they do not. As heretofore said, all facts well pleaded and set forth in the indictment must be taken to be true as stated. What then are the facts? I have as briefly as might be above recited them as they are fully and at length set out in the indictment.

It is pertinent here to consider the statute upon which the indictment is based. Eliminating words which have no direct reference to the facts of this case the statute is as follows:

"Every person who shall falsely make, alter, forge or counterfeit any record or other authentic matter of a public nature * * * by which any pecuniary demand or obligation or any right in any property is or purports to be created, increased, conveyed, transferred, diminished or destroyed * * * with intent to damage or defraud any person, body

politic or corporate" shall be deemed guilty of the crime of forgery.

The words "by which any pecuniary demand or obligation or any right in any property is or purports to be created, increased, conveyed, transferred, diminished or destroyed," it is maintained by ingenious and able counsel for the state, do not apply to the words "any record or other authentic matter of a public nature." Under the familiar rule of *ejusdem generis* this contention must fall. The substance and effect of this rule is found stated in many decisions, and is given in Lewis' Sutherland on Statutory Construction in these words: "It is a principle of statutory construction everywhere recognized and acted upon, not only with respect to penal statutes, but to those affecting only civil rights and duties, that where words particularly designating specific acts or things, are followed by and associated with words of general import comprehensively designating acts or things, the latter are to be regarded as comprehending only matters of the same kind or class as those particularly stated. They are to be deemed to have been used, not in the broad sense which they might bear if standing alone, but as related to the words of more definite and particular meaning with which they are associated." Further, the punctuation makes the construction argued for by the state, to my mind, wholly inadmissible.

It follows, then, that to sustain this indictment for forgery it must set out a forgery for a record or other authentic matter of a public nature, by which a pecuniary demand or obligation or any right in any property is or purports to be created, conveyed, transferred, diminished or destroyed, with intent to damage and defraud some person, body politic or corporate.

We have stated in the indictment:

First. An ordinance of the city of Chicago to construct a conduit for telephone and telegraph wires in the streets of Chicago. The mayor was given authority by this ordinance to designate in what streets these conduits might be laid.

Second. Without any permit signed by the mayor and without any authorization by the city council a tunnel twenty-

five feet high and six feet wide was being constructed, and 560 feet of it had been constructed at the time the resolution of the council was passed calling upon the commissioner of public works to make a report, as set out in the Herrmann resolution.

Third. The report was made, which truly and fully set forth all that had been done and was being done and under what authority.

Fourth. The defendants fraudulently and feloniously altered, forged and counterfeited (if the papers were those upon which an alleged forgery could be based) the order of the city council to file or receive (for the words are practically synonymous) the report of the commissioner of public works, by adding thereto the words above set forth. The council, it is alleged, ordered the filing of the report.

There can be no question as to the power of the council to make such an order, nor can there be doubt as to the right of and legal power of the council to vote to "approve" or "reject" the report made pursuant to its previous order in the Hermann resolution.

The ninety-sixth clause of section 1, article 5, of the city charter conferred upon the city council power "to pass all ordinances, rules, and make all regulations proper and necessary to carry into effect the powers granted" in such charter. The preceding ninety-five clauses of said section specify in detail these various powers. In only a few of them is the power conferred required to be exercised through the enactment of a formal ordinance with the enacting words "Be it ordained by the city council." (See sec. 2, Id.) Section 3 provides for the publication of all ordinances "imposing a fine, penalty, imprisonment or forfeiture, or making any appropriation." Its closing sentence is, "All other ordinances, orders and resolutions shall take effect from and after their passage unless otherwise provided therein." It would be impracticable if not impossible by ordinance for the city to exercise many of the multiform powers conferred. The corporation can not accomplish by an order or resolution (the words are used interchangeably) that which under its char-

ter is only permitted to be done by an ordinance. "An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a temporary character." Again, "It may be stated as a general rule that matters upon which a municipal corporation desires to legislate must be put in the form of an ordinance, while all acts that are done in its ministerial capacity and for a temporary purpose may be put in the form of a resolution." (See McQuillan, *Municipal Ordinances*, sec. 2, and cases cited.)

"The resolution is designed to meet specific and individual cases." (1 Thompson, *Corporations*, sec. 937.)

"The general rule is that when the charter is silent as to the mode of doing an act, the act may be done and evidenced by a resolution." (*Atchison Bd. of Ed. v. DeKay*, 148 U. S. 591, 37 Law. Ed. 576, and cases cited.)

It thus appears that the general powers of law applicable to municipal corporations permit and sanction the doing of a vast number of acts, which such organizations must perform, by means of orders and resolutions duly passed by the city council, and that this method of enforcing many of the powers conferred in the charter of Chicago is recognized in the charter itself.

The city council had ample power, then, to dispose of the report sent to it by the commissioner of public works, as it saw fit. This action was not one requiring the passage of an ordinance. The council might have said nothing when the report came in. It might have placed it on file, receiving it merely. It might have approved. Placing it on file would not be an affirmative act, such as would commit the council or the city to anything in the report. Such would not, however, be the case, should the council by vote approve or adopt the report.

For the first time, as far as this record shows, the council, from the report filed, learned that the corporation had proceeded to lay conduits in the streets without the permits required in the ordinance, from the mayor.

It learned for the first time that an underground tunnel of large proportions was being laid, which the city engineer

thought was not unnecessarily large for telephone and telegraph uses. It learned for the first time these facts, and of the method of doing the work as shown by the permits. It had the statement also of an honorable and capable and in all respects trustworthy commissioner of public works, of his approval of all that had been, and was being done under the ordinance, as being within the letter and spirit of the ordinance, as he construed it. It might be admitted that his views would have been the views of the best and wisest men in the city, had they equal knowledge of the matter; yet he could not bind the city, nor did he attempt to do so. In obedience to the direction of his superior, the city of Chicago, he made his report, and gave his opinion. The city council was then, if it desired, to approve his report. The indictment says that it did not approve, that it only placed the report on file, but that the defendants altered the record showing the action of the council by making it show that on motion of Alderman Novak, of the eighth ward, that report was approved and placed on file, which alteration, it is alleged, constituted and was a forgery of a record or other authentic matter of a public nature with intent to defraud, etc. It is strongly urged that said purported order or resolution of the council was not one "by which any pecuniary demand or obligation or any right in any property was or purports to be created, increased, conveyed, transferred, diminished or destroyed."

Let us for a moment consider the meaning of these words, all of which under the rules of legal construction must be given force and effect, if possible. I submit that they include everything that can possibly be done by means of a "record or other authentic matter of a public nature" or by means of a "charter," "letters patent," "deed," "lease," "indenture," "writing obligatory," "a will," or by any other of the subjects of forgery mentioned in the statute. A pecuniary demand or obligation or a right in property may be created, it may be increased, it may be conveyed, it may be transferred, it may be diminished, it may be destroyed, by any of these instruments of which a forgery may be effected.

That includes all that can be done by and through these different named instruments, documents, etc. Broader terms could hardly have been used.

Can the courts say, without bringing in extrinsic matters, that the forgery of the word "approved" in this case did not, could not have an effect to "create" a pecuniary demand or obligation or any right in any property, that it did not, could not have an effect to "increase" any right in any property, that it did not, could not have an effect to "convey" or "transfer" any right in any property, that it did not, could not have an effect to "diminish" or "destroy" any right in property?

The city holds the streets and public places as property. They belong to the city. Some are held in fee and in others it has the perpetual right of user, which is also property. It might be said that no forgery could create, etc., any pecuniary obligation or give any right in property, for the law will treat it as a void and criminal act. A note forged is in effect no note at all. No pecuniary obligation is created thereby. So the forgery of this record, in very fact, neither could create, diminish or destroy the legal rights of the city, but it could purport to, just as the forgery of any other instrument could purport to create rights. It is held as fundamental law that it is not necessary that the indictment show how the false instrument would, if true, create, increase, diminish or defeat any pecuniary obligation, or would transfer or affect any property whatever. These are deductions of law not to be varied. Ency. P. & P., p. 558, and cases cited.

"Nor does the rule require that an indictment should contain a specific allegation of the existence of every fact, the existence of which is assumed in a forged instrument. It is enough if the writing is one which, if genuine, might apparently be of some legal efficacy." Id. 559.

"The general rule is that if the instrument is void it is no crime to forge it. Yet, even in such case, where the paper does not appear to have any legal validity or to show that another might be injured by it, but extrinsic facts exist by

which the owner of the paper might be able to defraud another, then such facts being averred in the indictment would make the forgery of the instrument a crime." For, as Judge Cowen said in *People v. Shall*, 9 Cowen, 778, "An instrument purporting to be void on its face and not shown by the averment to be operative if genuine, is not the subject of forgery." No one can question this law. It is recognized in all the text books as well as in the decisions of the courts of last resort.

It is said, however, that "apparent legal efficiency is enough. It is not necessary that such suit (based upon the forged paper) should have in it the elements of legal success. It is enough if the forged instrument be apparently sufficient to support a legal claim and it is sufficient if the claim be only indirect." 1 Wharton, Crim. Law, 680.

And again, "An instrument to be the subject of forgery must be such that it can be used as proof, either perfect or imperfect, in a suit with another." Id. 691, sec. 91.

"If the instrument is one which could be used in evidence it is held to be one which would make it the subject of forgery.

"The record of such (municipal) corporations are evidence generally. Their acts are of public character and the public is bound by them." See *Weith v. City of Wilmington*, 68 N. C. 34; citing 2 Phillips, Ev. and Greenleaf, Ev., 2d. ed. 484.

"Nor need there be a person capable of being immediately defrauded by the forgery. It is enough if the injury may be possibly inflicted in the future." 1 Wharton, Crim. Law, 694.

This principle is supported by many citations illustrating it in Wharton, sec. 695, of the work above cited. In *Bowles v. State*, 37 Ohio State, 35, it was held that even though the statute under which a forged bond purports to be issued may be declared unconstitutional an indictment for forgery of it would be upheld, and it is enough if there be a probability of fraud.

Chief Justice Fuller in *United States v. Lacher*, 134 U. S. 624, tersely declares the law to be that "Before a man can be punished his case must be plainly and unmistakably within

the statute. But though penal laws are to be construed strictly, yet the intention of the legislature must govern in construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature." He cites in this connection Mr. Justice Story and approves the declaration of Mr. Sedgwick in his work on Statutory and Constitutional Law, 282, in which he says "Courts refusing on the one hand to extend the principle to cases which are not clearly embraced in them, and on the other equally refusing by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope." Following this rule of construction I find the offense charged in the forgery indictment to be a statutory crime under the law in this state and to be clearly and adequately set out in the indictment.

The motion to quash the indictment is denied, and the defendants are required to plead to the same.

The same order will be entered in the indictments for perjury.¹

Circuit Court of Cook County. In Chancery.

The Buda Foundry & Manufacturing Company, et al.

vs.

Columbian Celebration Company, et al.

(August 6, 1903.)

1. CAPITAL STOCK—TRUST FUND FOR CREDITORS. The capital stock of a corporation is a trust fund for its creditors. This trust fund consists of the capital paid in and that which the creditor has promised to pay in.
2. SAME—DEVICE TO AVOID STOCK LIABILITY. Any device between stockholders, or between stockholders and the corporation, by which the stockholders' liability to the creditors is sought to be avoided, is against public policy and void, even though the transaction may be binding as between themselves.

¹ For the decision on the motion to direct a verdict, see *People v. Loeffler*, 1 Ill. C. C. 381, *supra*.—Ed.

3. **SUBSCRIPTION TAKEN IN PROPERTY—OVERVALUATION—HONEST MISTAKE, ETC.** A subscription to stock may be paid in property but there must be an honest attempt to arrive at the actual value of the property. If the property is fraudulently overvalued, such overvaluation will be held void as a matter of law, although an honest mistake as to such value will not invalidate the transaction.
4. **SAME—EFFECT OF OVERVALUATION—HOW STOCK MUST BE PAID FOR.** If the property contributed in payment of a subscription is not valued in good faith, or if there is an intentional overvaluation by the directors, or if the property is entirely worthless, the stock will be considered as not fully paid. As against creditors the stock must be paid for in "money or money's worth."
5. **SAME—PAYMENT OF SUBSCRIPTION IN PROPERTY—GOOD FAITH OF DIRECTORS.** To constitute a valid payment of a stock subscription by the transfer of property, there must be good faith on the part of the directors. The law does not require infallible judgment, but where the evidence shows an intentional overvaluation or any device to obtain possession of the stock without fully paying for it, the transaction will be deemed fraudulent in law and in fact.
6. **SAME—CRUDE AND UNDEVELOPED INVENTIONS AS PAYMENT FOR STOCK SUBSCRIPTIONS.** Where the evidence shows that an inventor and organizer of a corporation turned over to the corporation in full payment for his subscription of \$2,000,000, certain crude and undeveloped inventions which had never been in use and had no known value, and the board of directors was controlled by such inventor, and it was not shown that any of said board honestly believed that the inventions were worth the amount of said subscription and there was no honest discussion or inquiry as to the value of such inventions, it was held that the scheme was a fraudulent one and the stock could not be considered as paid up.
7. **SAME—ENTIRE STOCK OF CORPORATION ISSUED IN EXCHANGE FOR CERTAIN INVENTIONS—WHETHER PAID FOR.** Where the entire capital stock of a corporation is issued in exchange for certain inventions to be used in a certain amusement enterprise, and the company possessed no land, or site for the projected building, and it had no means of obtaining any money, except from its subscriptions, these facts must be taken into consideration in determining the good faith of the transaction.
8. **SAME—VALUE OF PROPERTY—FUTURE PROFITS—SPECULATIVE VALUES.** Property taken in payment of stock subscription must be capable of pecuniary estimate. A guess or an estimate as to

the value of a right to use certain crude and undeveloped inventions, based entirely on speculative profits from the future use of such inventions cannot be considered as determining the value of such inventions.

9. **SAME—ARRANGEMENT BETWEEN STOCKHOLDERS AS TO PAYMENT OF SUBSCRIPTIONS.** Any arrangement between stockholders by which the stock is but nominally paid up, the corporation not in fact getting the benefit of the price in good faith, will be regarded as a sham and not as a valid payment, as against the creditors of the corporation.
10. **SAME—FRAUDULENT PAYMENT OF SUBSCRIPTION.** Where certain inventions are turned over to a corporation in payment of a subscription to its stock and a large part of such stock is turned back into the treasury of the corporation to be used for promotional purposes, such transaction will be considered as fraudulent both in law and in fact.
11. **PAROL EVIDENCE—ADMISSIBLE TO SHOW WHAT AGREEMENT REFERRED TO.** Where a subscriber for the bonds of a certain corporation is entitled to certain shares of stock as a bonus and no particular shares of stock are designated, parol evidence is admissible to show what particular stock is referred to.
12. **STOCK SUBSCRIPTION—EFFECT OF ISSUANCE OF STOCK AS FULLY PAID—RECITAL IN CERTIFICATE.** The mere fact the stock was issued as fully paid does not make it so in fact. The subscribers cannot safely rely upon the recital on the face of the certificate that the stock is fully paid and make no further inquiry.
13. **CERTIFICATE OF STOCK—RECEIPT OF—IMPLIED PROMISE TO PAY THEREFOR.** A promise to take a share of stock imports a promise to pay for it, even though the certificate is stamped "non-assessable."
14. **SUBSCRIPTION FOR BONDS AND STOCKS—APPLICATION OF PAYMENTS—STOCK LIABILITY.** Where defendants subscribe for bonds of a corporation and receive certain shares of the capital stock of the corporation as a bonus, and an action is instituted to enforce a liability on such stock to the creditors of the corporation, a court of equity will not treat the money paid under the subscription agreement as paid upon the stock, as against the claim of creditors becoming such with knowledge that the stock was unpaid.
15. **STOCK SUBSCRIPTION—BONA FIDE PURCHASERS—BONUS STOCK.** Where certain persons subscribed for the bonds of a corporation and received certain shares of its stock as a bonus, to be delivered upon payment for the bonds, such subscribers were put upon inquiry as to the character of the stock and the

right of the corporation to dispose of it at less than par. If no inquiry was made, the law holds such stockholders chargeable with that knowledge which a reasonable inquiry would have disclosed.

16. **SAME—WHETHER STOCK TRANSFERRED BY CORPORATION IS A BONUS OR GIFT, OR A SALE.** The defendants subscribed for certain corporate bonds and received with such subscription certain stock of the corporation as a gift or bonus. The stock in question had been previously subscribed for and supposedly paid for by the transfer to the corporation of certain inventions of doubtful value, and thereafter such stock was turned back into the treasury of the corporation for the purpose of re-issuing the same to the subscribers for the bonds. *Held* that inasmuch as the stock was turned back to the corporation without anything being paid for it, it stood in the same position as if it was never issued and upon its re-issuance to the subscribers for the bonds, such subscribers cannot be treated as assignees but must be treated as original subscribers and held liable as such.
17. **SUBSCRIPTION AGREEMENT—REQUISITES OF.** No particular form of words is necessary to constitute an agreement to become a stockholder. If the contract amounts to an agreement to take from the company its stock that is sufficient.
18. **STOCKHOLDERS—CHARGEABLE WITH NOTICE THAT STOCK MUST BE PAID FOR.** Subscribers to the capital stock of a corporation are presumed to know that the corporation could not legally issue fully paid stock to any one agreeing to become a stockholder, without the same being paid for in money or in money's worth.
19. **LIABILITY OF STOCKHOLDERS—STOCK RECEIVED AS BONUS WITH PURCHASE OF BONDS—EFFECT OF REFUSAL TO ACCEPT.** Certain persons agreed to take and pay for certain bonds of a corporation. The subscription agreement provided that upon full payment being made the subscriber should be entitled to receive certain shares of stock as a bonus. After signing the subscription agreement and paying for the bonds, certain of the subscribers neglected or refused to accept the stock. *Held* that the true construction of the agreement was that upon the payment for the bonds the subscriber *eo instanti* became entitled to the stock, and thereupon the liability of such subscribers became fixed as stockholders and they could not rescind such agreement in whole or in part, as against the creditors of the corporation.
20. **SAME—EFFECT OF REFUSAL TO ACCEPT STOCK OR BONDS.** The same measure of liability attaches to such of the subscribers of bonds who either refused or neglected to take either stock or bonds. Having paid for the bonds and not having exercised

any right to rescind the subscription agreement their liability to creditors became fixed and determined.

21. **SUBSCRIPTION AGREEMENT—RIGHT TO RESCIND.** Upon the execution of a subscription agreement, the liability of a subscriber to the creditors immediately attaches, and such subscriber cannot escape liability by a rescission of the contract.
22. **STOCKHOLDERS' LIABILITY—PURCHASERS FOR VALUE—LIABILITY OF EFFECT OF NOTICE.** A purchaser or assignee of stock which has not been fully paid is not liable to corporate creditors, where the stock has been issued as fully paid and he has acquired the same in good faith and without notice that it has not been fully paid. But if he has notice that it is not fully paid he is liable.
23. **STOCKHOLDER'S LIABILITY—EXTENT OF KNOWLEDGE THAT STOCK WAS NOT PAID UP.** Where the subscribers to bonds of a corporation receive an equal amount of the shares of stock of the corporation as a bonus and at the time of the making of the subscription they are informed that the capital stock has been paid up by the transfer to the corporation of certain inventions and patents, and such inventions and patents are of uncertain and doubtful value and such subscribers blinded by the promise of large dividends rely upon the statements of the officers of the corporation as to the value of the inventions, etc., and make no independent inquiry, they are chargeable with knowledge that such stock is not paid up, and cannot be considered as purchasers for value.
24. **SAME—BELIEF OF SUBSCRIBER THAT STOCK IS PAID UP—EFFECT OF.** The fact that the subscribers honestly believed that the capital stock was fully paid for is no defense to an action to enforce a stock liability. In order that such belief should be available as a defense it must be based upon a statement of facts which the purchasers believed to be true and which facts if true, would constitute a sufficient payment of such stock. A mere statement either of fact or law by a third person is not in itself a sufficient foundation for a belief, which the law will recognize as relieving such person from liability, but the facts from which such conclusion is arrived at must be considered.
25. **SAME—GOOD FAITH OF SUBSCRIBER—EFFECT OF BELIEF IN SUCCESS OF ENTERPRISE.** It is not a defense to an action to enforce a stock liability that the subscriber acted in good faith in signing the subscription agreement, or that he believed that the enterprise would be a success.
26. **STOCK SUBSCRIPTION—PAYMENT IN MONEY'S WORTH—RULE IN ILLINOIS.** The courts of Illinois have not departed from the rule that a payment of a stock subscription is not good as against creditors where payment has not been made in money or

money's worth. Stock may be paid for in property but such property must be valued in entire good faith. If there is an overvaluation combined with a failure to exercise any judgment as to the value of the property, or where there is an intentional overvaluation or where the circumstances show that the transaction was a mere fraudulent device, the stock will not be considered as full paid.

27. SAME—LIABILITY OF ASSIGNEE—EFFECT OF NOTICE. The purchaser of stock issued as "paid up" with notice that it is not paid up, or with notice of facts connected therewith, is liable to the creditor to the same extent as his immediate transferor.
28. SAME—WHEN STOCKHOLDERS ARE BONA FIDE PURCHASERS—WHAT KNOWLEDGE IMPUTED TO THEM. Persons purchasing the bonds of a corporation and receiving its stock as a bonus are not permitted to deal with the corporation with their eyes shut. As bond holders they are chargeable with notice of the contents of the mortgage and with the provisions of any contracts referred to therein, and as stockholders they must take notice of the amount of the capital stock, the contents of the charter, as well as the law of the land governing such corporations. Where the circumstances are sufficient to put a reasonably prudent and cautious man upon inquiry as to the good faith of the transaction by which the stock of the corporation is paid up, such subscribers cannot be considered as innocent holders.
29. SUBSCRIPTION TO STOCK—EVIDENCE OF. Evidence examined and held sufficient to show that certain defendants were liable as subscribers to the capital stock, even though it was not shown that they actually signed the subscription agreement.
30. LIABILITY OF STOCKHOLDERS—ENFORCEMENT AGAINST ESTATE—PERSONAL REPRESENTATIVES NOT MADE PARTIES. Where an action is instituted to enforce a stockholder's liability, and such stockholder dies during the pendency of the suit, no decree can be rendered against his estate, where his personal representatives have not been made parties.
31. LIABILITY OF STOCKHOLDERS—BURDEN OF PROOF. Where complainants in an action to enforce stockholder's liability, show that certain stock which had been transferred to one of the defendants was unpaid stock, the burden of proof is upon such defendant to show that he is a purchaser for value.
32. CREDITOR'S AND STOCKHOLDER'S BILLS—JUDGMENT AND CONTRACT CREDITORS—RIGHTS OF. A judgment creditor has a standing in equity to pursue all the property of his debtor and can equitably attach all rights and credits of his debtor. A simple contract creditor has no such standing in a court of equity and

can only file a bill to enforce stockholder's liability by virtue of section 25 of the general incorporation act.

33. **STATUTE OF LIMITATIONS—IN ACTION TO ENFORCE STOCKHOLDER'S LIABILITY—WHEN A BAR.** A bill was filed to enforce stockholders' liability and a demurrer was sustained thereto and the bill dismissed. Upon appeal the judgment was reversed. The defendant was not notified of the redocketing of the case within five years as required by law. *Held* that the statute of limitations was a bar to the action.
34. **SAME—ESTATE OF DECEASED STOCKHOLDERS.** Where an action is brought to enforce a stockholder's liability and certain stockholders de cease during the pendency of the suit, and the suit is not revived by bringing in the executors or administrators of such deceased stockholders within two years from the date of the issuance of the letters, the only decree that can be made against any executor or administrator is that the same be paid out of assets discovered or inventoried after the expiration of said two years.
35. **STOCK AND STOCKHOLDERS—LIABILITY OF TRUSTEE.** Where certain shares of stock are deposited with a bank as trustee to deliver the same to the subscribers for bonds of the corporation as a bonus, and such bank merely acts as a conduit through which the corporation transfers said stock to the bondholders, such bank is not liable as a stockholder within the meaning of section 25 of the General Incorporation Act of Illinois.
36. **ENFORCEMENT OF STOCKHOLDER'S LIABILITY—RIGHT TO SET OFF CLAIMS AS BONDHOLDERS.** Where certain defendants subscribe for the bonds of a corporation and receive stock of the corporation as a bonus, and an action is instituted to enforce a stockholder's liability with respect to such bonus stock, it was *held* that the defendants were not entitled to set off the amount of their liability on the stock against any claim they may have on the bonds. They must first pay for their stock and file their claim on the bonds.
37. **BONDHOLDERS—RIGHT TO SHARE EQUALLY WITH OTHER CREDITORS—APPLICATION OF MAXIM "HE THAT DOETH INIQUITY SHALL NOT HAVE EQUITY."** Bondholders of an insolvent corporation who were also stockholders, but received their stock as a bonus with their subscription for bonds, are entitled to share equally with other creditors in the distribution of the corporate assets, even though they originally paid nothing for their stock. Although the transaction by which they received their stock as a bonus was fraudulent in law, there being no actual fraud, such stockholders cannot be considered as not coming into court "with clean hands."

Bill to enforce stockholders' liability. Circuit court Gen. No. 116,462. Heard upon exceptions to master's report before Judge Murray F. Tuley.

The facts are stated in the opinion.

Scott, Bancroft, Lord & Stephens, Herrick, Allen, Boyesen & Martin, E. R. Bliss and Francis B. Riddle, solicitors for complainants.

Moran, Mayer & Meyer, Henry M. Bacon, George S. Baker, Bangs, Wood & Bangs, J. A. Burhans, R. A. Burton, Gurley & Wood, Holt, Wheeler & Sidley, A. B. Jenks, Samuel A. Lynde, J. B. Mann, Mats, Fisher & Boyden, Murry Nelson, Jr., W. S. Oppenheim, Paden & Gridley, Orville Peckham, Remy & Mann, Runnells & Burry, Smith, Helmer Moulton & Price, Swift, Campbell & Jones, Leroy D. Thoman, Wagner & Kendig, Wilson & Cook, Walpole Wood, and Frank Crozier, solicitors for various defendants.

TULEY, J.:—

The statement of this case by Master Leaming is, in substance, that the complainant, the Buda Foundry and Manufacturing Company, an Illinois corporation, a simple contract creditor (in the sum of \$9,378) of the Columbian Celebration Company, also an Illinois corporation, on June 10, 1893, filed its bill of complaint under section 25, chapter 32, of the Revised Statutes, on behalf of itself, and all other creditors against the latter company and numerous parties alleged to be stockholders of said defendant corporation; alleging that said Columbian Celebration Company had ceased to do business, leaving unsecured debts unpaid, amounting to more than \$300,000; that its assets did not amount to more than \$50,000, and that it carried an incumbrance, a trust deed, purporting to secure \$800,000 of bonded indebtedness of said corporation, and also alleging that the stock of said corporation had not been paid. The said bill of complaint, commonly called a "winding-up" bill was subsequently amended.

The master then refers to the filing under said section 25, of a prior bill, by Steele Mackaye, against the Columbian Celebration Company, on the 30th of May, 1893, which bill is

alleged to have been fraudulent and collusive. The master sets out the proceedings and pleadings on such prior bill, which are unnecessary to specify in this opinion, as the same was subsequently dismissed out of this court.

The defendants herein, (over one hundred in number), having been brought into court, issues were joined, and the cause referred to Master Leaming in November, 1895. Before the reference numerous parties had been made co-complainants.

The master's report was filed in this court in June, 1902, and now comes up on exceptions. It appears from the evidence reported by the master, that Steele Mackaye, one of the defendants herein and the chief promoter of the Columbian Celebration Company, had, prior to the formation of said company, formed a scheme in connection with one Crosley and others, for the organization of a spectacular show of a somewhat similar nature to that contemplated by the Columbian Celebration Company's charter, in which were to be used all or nearly all of the inventions that were subsequently transferred to the Celebration Company, and to that end as early as the 16th of December, 1891, said Mackaye caused an application to be made and filed with the secretary of the state of Illinois, for the incorporation of the "Spectatorio Company," the object of which was stated to be, "the ownership, sale and licensing and presentation of spectacles, dramas, operas, pantomimes and other forms of theatrical and dramatic character, and the ownership, sale, licensing and use of every form of invention and improvement, in the art of producing effects of whatever character upon the stage."

Authority to take subscriptions of capital stock to the amount of \$100,000 in \$100 shares, was duly issued, and the capital stock was subscribed for as follows: Steele Mackaye, 998 shares; Powell Crosley, 1 share; Louis B. Uttz, 1 share; and the three were elected directors on the 11th day of January, 1892. A charter was issued to the company on the 13th of January, 1892.

It appears, however, that Mackaye, Crosley and others interested in promoting the Spectatorio Company (which was intended to be used in connection with the World's fair of

1893), concluded to broaden their project, and in place of a show with a capital of \$100,000, to project a much more extensive one with a capital of \$2,000,000. This resulted in the organization of the defendant, the Columbian Celebration Company.

The master finds as to the organization of the Columbian Celebration Company, "that, in the latter part of 1891, Steele Mackaye conceived a scheme to build an enormous building for the purpose of introducing and exhibiting spectacular plays and pantomimes at Chicago, Illinois, with particular reference to the World's Columbian Exposition there projected, so that the large attendance upon said exposition then anticipated could at least, in part, be attracted and induced to contribute to the financial benefit of the scheme of Mackaye. Mackaye was a man of considerable experience in theatrical matters, of an inventive mind, daring, forceful and magnetic. At this time he had small financial resources, but had conceived some novel and brilliant plans for stage effects by mechanical and electrical means. Mackaye was joined in the scheme by Benjamin Butterworth, an ex-commissioner of patents and a patent lawyer, and Powell Crosley, residing at Cincinnati, Ohio, as promoters of the enterprise; W. L. B. Jenney, an architect of Chicago, was applied to by Mackaye to assist him in drafting and formulating the ideas of Mackaye into practical form and expression; that on or about the 16th of May, 1892, articles of incorporation were certified to by the secretary of the state of Illinois, for the incorporation of the Columbian Celebration Company, with capital stock of two million dollars; 20,000 shares, par value \$100 each, of which Steele Mackaye had subscribed for 19,996 shares; Benjamin Butterworth, 1 share; Powell Crosley, 1 share; Stephen C. White, one share; and Howard O. Edmonds, one share; all of whom were made and constituted the board of directors. That the above Stephen C. White was the clerk of Mackaye, and Howard O. Edmonds was the clerk of Butterworth."

On the 16th of May, 1892, was held the first meeting of the board of directors, at which all the above named were present,

excepting Crosley. Butterworth was made president; Crosley, vice-president, and White, secretary. At that meeting a resolution was adopted to the effect that: "The officers of the company are hereby authorized and directed to close the contract with Steele Mackaye for certain inventions, rights, privileges and property, according to the terms embodied in the contract this day submitted to the board, a duplicate copy of which is on file in the office of the secretary of this company, and that the president and secretary be directed, on delivery to the company by Mackaye of a good and sufficient assignment of the rights, inventions, property and interest, etc., mentioned and referred to in the contract, to issue to him as full and final payment for said inventions, etc., 19,996 shares of the capital stock of the company; he to accept the stock and the royalty provided for in the contract and assignment, in full satisfaction and discharge of the consideration for said inventions, etc. The said inventions, etc., being accepted by the company in full payment of the par value of the stock so issued, making the same full paid and non-assessable."

On said 16th day of May, 1892, at said meeting of the directors of the Celebration Company, an agreement in writing was entered into between the corporation and Steele Mackaye. This contract recited, in substance, that Mackaye had invented a large number of new, useful and valuable improvements in scenic art for the advancement and development of realism and nature in that art; the inventions named in the agreement and the object and purpose of the same, respectively being set forth, are numbered from 1 to 11, viz.:

1. Sliding stages; 2. Floating stages; 3. Telescopic stages;
4. Apparatus for producing scenic effects, (a) Illumiscope, or a combination of reflectors, (b) Colorators, or drums of colored paper, glass, etc.; 5. Wave maker; 6. Automatic proscenium adjuster; 7. Luxauleator, or curtain of light; 8. Automatic interpreter; 9. Apparatus for producing scenic effects and increasing realism; 10. Cloud creator, or nebulator;
11. A spectatorium and a spectoria, "The Great Discovery," and a scenario, the same duly copyrighted by Mackaye.

The number of the respective applications for patents for each of said inventions (except the 11th) appear in the agreement; also their dates respectively, which date is alleged to have been the 25th of May, 1892, although such date was nine days after the day the agreement was made, to-wit, the 16th of May, 1892. The date of the application for the 11th is recited as that of December 12, 1892 (the evidence tending to prove that said numbers of the respective applications and the dates when the same were made, were left blank in the original contract, and subsequently inserted).

The agreement further recites that the company desires to obtain the exclusive right to use in seven states, etc., said several inventions, etc., for the purpose of producing spectacles, and particularly "The Great Discovery," the said company being organized for that purpose.

Mackaye, in consideration of 19,996 shares of the stock of the Celebration Company delivered to him (the company having accepted the rights, property, privileges and franchise assigned by Mackaye as payment in full of said shares of capital stock), and the payment to him of the royalty as thereafter provided, he, Mackaye, sells and assigns to the company the sole and exclusive right to the said several inventions, and the use of the spectoria within said territory, and all improvements made thereon; but, on condition that the company pays to Mackaye, or his assigns, a royalty of ten per cent. on the gross receipts on the sale of admission tickets, to be ascertained and paid daily, and with the provision that the term of the contract should be ten years, after a lapse of which, all the rights, inventions, franchises, etc., granted, were to revert to Mackaye.

On the 21st of May, 1892, the stock was issued to Mackaye evidenced by certificate No. 1, for 19,996 shares, and on the same day Mackaye, in consideration of 998 shares of the capital stock of the Spectatorio Company (received by that company in full payment of his subscription) assigned to said Spectatorio Company the same inventions, rights, privileges and franchise, subject however, to the license given to the

Columbian Celebration Company; and also at the same time assigned his right to the royalty of ten per cent. from the Celebration Company.

The evidence shows, and the master so finds, that on neither the 16th nor the 21st of May, had any application been made for said patents, and Steele Mackaye then appeared to be the owner of all the stock of the Celebration Company, except four shares; and all the stock of the Spectatorio Company, except two shares; that on said 21st of May, no money or other property had been paid on any of the capital stock of the Celebration Company, and that its assets consisted of claimed devices and inventions of Mackaye, not then developed, or in any manner practically applied; that the sale of inventions from Mackaye to the Celebration Company was practically a sale to himself; and that, of the directors who voted for such sale, Edmonds and White were dummies, and Butterworth was a promoter of the enterprise with Mackaye, assisting him in carrying out the scheme; also that none of such inventions or devices had ever been practically applied or tested.

The record book of the Celebration Company shows that the next day after Mackaye received his certificate of stock, on, to-wit, the 22nd of May, he transferred of said stock of the Columbian Celebration Company 1,542 shares to said Butterworth; 1,542 shares to said Crosley; had the old certificate cancelled, and directed new ones to be issued for said amounts of stock to each said Butterworth and Crosley, and the balance to himself. Also, that on the 17th of May (the next day after the agreement that the Celebration Company would take in payment for Mackaye's subscription an assignment of said inventions, etc.) the board of directors of the Celebration Company, by a preamble and resolutions, declared that the company would require, for the purpose of effectually promoting, etc., and carrying out the business for which it was organized, the sum of \$800,000, and desired to raise the same by the sale of \$800,000 of its first mortgage bonds, and directed the president to procure the bonds Nos. 1 to 800, for \$1,000 each, with interest coupons, interest at seven per cent. per annum, payable July 1, 1893, and January 1, 1894, at the American Trust

& Savings Bank, Chicago, the principal of the bonds being payable on or before January 1, 1894, at said bank, the bonds to be secured by a mortgage or trust deed of the Celebration Company to the said bank as trustee, upon all the property acquired, or to be acquired, and all franchises, effects, etc., incomes and other sources of revenue of the Columbian Celebration Company. The master finds that in order to facilitate the sale of the bonds and raise money for erecting a building and securing a site for the same, and for working out the designs of the Celebration Company, Mackaye agreed, and did contribute, 8,000 shares of its capital stock, so obtained by him from the Celebration Company, to be used as a bonus, to induce subscriptions to the bonds of the corporation, and that the Celebration Company and Mackaye caused to be transferred to said American Trust and Savings Bank, 8,000 of such shares to be held by said bank for the use of said company, and under its direction to transfer an amount of said 8,000 shares, whose par value should equal the par value of the bonds subscribed and paid for by any person to said Celebration Company (when notified by the Celebration Company of such payment); and to hold the remainder subject to the order of the Celebration Company; and that the American Trust & Savings Bank had no interest in said 8,000 shares, but simply acted as a conduit.

The evidence shows that a prospectus of the enterprise was issued and circulated by the Celebration Company, Mackaye and other promoters of the enterprise, in the spring and early summer of 1892. It states that, "Every one purchasing a bond, obtains in addition to the bonds bought an amount of the stock of the company equal to the amount of the bonds he has purchased." The exact date when the circular containing that clause was first circulated, does not clearly appear, but the evidence raises a satisfactory presumption that the raising of money by the sale of mortgage bonds, with a bonus of stock, was a part of the original scheme of Mackaye, Butterworth and the other promoters.

The Celebration Company sold upwards of \$500,000 of its bonds upon the terms set forth in a certain subscription agree-

ment, and it is upon this subscription agreement that the main contest in this case as to \$500,000 of stock liability arises. The subscription paper is as follows:

"We, the undersigned, hereby severally subscribe to the number of first mortgage bonds of the Columbian Celebration Company set opposite our respective names, and we severally agree to pay for the same one thousand dollars (\$1,000) each, at such time and in such installments as the board of directors of such corporation may request. This subscription is made on the condition that the said bonds are made preferred in payment by the said corporation, and on the further condition that the said bonds draw interest at the rate of seven per centum per annum from the date of subscription; and on the further condition, that upon full payment being made for the bonds subscribed for, each subscriber shall be entitled to receive, and there shall be delivered to him by the American Trust & Savings Bank, trustee, an amount of the full paid, and non-assessable capital stock of the Columbian Celebration Company, equal in par value to the par value of the bonds so by him subscribed and paid for.

"Chicago, July 6th, 1892."

Nearly all of the defendants sought to be made liable as stockholders in this proceeding, are alleged to have become subscribers to said agreement and to have become liable as holders or owners of a part of the \$800,000 of stock placed by the Columbian Celebration Company and Mackaye, with the American Trust & Savings Bank as trustee. A few of the defendants (among them J. Foster Rhodes, the two Gillettes, and one Drake, and some one or two others) are sought to be held liable also on stock issued by the Celebration Company to Mackaye other than the 8,000 shares of stock which were turned over to the American Trust & Savings Bank aforesaid.

The first question presented is, whether or not the 19,996 shares of the stock issued to Mackaye in exchange for an assignment of the right to use said inventions, etc., was in fact stock fully paid for as against the creditors of the corporation, who have filed the bill in this case under said section 25 of the Incorporation Act.

It is established law in this state that the capital stock of a corporation is a trust fund for the payment of its debts, and if the stockholder has not paid his subscription in full, he is liable for the debts of the corporation to the extent of the unpaid portion of his subscription; that this trust fund consists, not only of the capital actually paid in, but also of that which the stockholder has promised to pay in. The amount unpaid upon stock which has been issued, is as much a part of the corporate assets for the payment of creditors as the money which has been paid in upon such stock; that any device between stockholders themselves or between them and the corporation by which its liability to creditors is sought to be avoided, is void, whether the transaction be binding or not between themselves.

It is also well settled that property may be taken in payment of subscriptions, but when it is taken at an overvaluation (which overvaluation is so great that fraudulent intent appears upon its face and is not explained), the court will hold such an overvaluation to be void as a matter of law; that an honest mistake as to the value of the property will not invalidate the transaction, but that there must be an honest attempt to arrive at the actual value of the property and an entire good faith must characterize the transaction.

If the property contributed in payment for the subscription for the shares is not valued in good faith, or if it is taken without regard to its value, or if there is an intentional overvaluation by the directors, the shares of stock issued therefor will not be considered fully paid up in law or in fact by the contribution of such property. If such property is entirely worthless, the stock will be considered wholly unpaid, and the courts have established and enforced an inflexible rule that payment for stock subscriptions is good as against creditors, only when the payment has been made in "money or in money's worth."

The capital stock is held in trust by the directors and they cannot sell or give it away or transfer it without receiving payment therefor in money or in money's worth. This is the doctrine established by our supreme court in *Coleman v.*

Howe, 154 Ill. 458, *Union Mutual Life Insurance Co. v. Frear Stone Manufacturing Co.*, 97 Ill. 537, and numerous other cases in our state cited by the decisions quoted. The underlying requisite of a valid exchange of property for the subscription of shares is that there shall be good faith on the part of the directors. The law does not require that they shall be infallible in their judgment as to the actual value but if the exchange is made in such a way and under such circumstances as to show an intentional overvaluation of the property taken, or no valuation, in fact, or that the pretended exchange was a mere device to get possession of the stock without payment of the subscription, the transaction will be deemed fraudulent in law and in fact. Whether the directors in making such an exchange acted in good faith or not, must be determined from all the circumstances surrounding the transaction.

The inventions of Mackaye (in the right to use which consisted the entire consideration for the \$1,999,600 of Mackayes subscription), were, at the time such exchange was made, (according to the testimony) exceedingly crude and undeveloped, had never been in use and had no known value. It was not even known whether or not they were inventions which were susceptible of being patented, as no applications for a patent or even any *carcats* in regard thereto had been filed in the patent office at Washington.

The directors consisted of Mackaye, Butterworth, Crosley and two clerks, White, a clerk for Mackaye; and Edmonds, a clerk of Butterworth; two of these directors, Butterworth and Crosley, were substantially interested with Mackaye in carrying through this fraudulent exchange of property for the subscription. This clearly appears from the evidence, and also by the fact that upon the very next day after the exchange was made, Mackaye transferred to each (Butterworth and Crosley) 1,542 shares of the stock.

At the time the resolution authorizing the exchange was passed, Mackaye did not vote, and Crosley was absent; Butterworth and the two clerks being a majority of the board, voted for the exchange. Butterworth had been United States commissioner of patents, but it does not necessarily follow

that he was an expert, competent to judge of the value of these inventions, and the evidence fails to show that either of the clerks had any knowledge of the value of the inventions in question.

Butterworth and Mackaye died before their evidence was taken in this case, and Crosley has not testified as a witness. We have not, therefore, even their declarations under oath that they honestly believed these inventions to be worth the immense amount of money paid for them. Judging as to the good faith of the transaction, by their acts and surrounding circumstances, I am satisfied there was no honest exercise of judgment by the directors, or any of them, as to their value. There was no honest discussion or inquiry as to the value of such inventions or any one of them. The exchange was evidently a cut and dried affair, a fraudulent scheme of Mackaye, Butterworth and Crosley to obtain possession of the capital stock of the company and relieve Mackaye from payment of his subscription without paying therefor anything of known value, with the understanding or purpose that such part as might be necessary should be returned to the corporation to be used by the corporation in promoting and putting into operation the enterprise.

It was impossible at the time of such exchange, to fix any money valuation upon the so-called inventions, and any valuation fixed upon them at that time must necessarily have been purely imaginative, speculative and not based on what they were worth, or what they would sell for.

It is a fair inference from the evidence that Mackaye and his assistants, Butterworth and Crosley, originally intended that the inventions should be transferred to the Spectatorio Company in exchange for \$98,000 of the \$100,000 of the stock subscribed for by Mackaye, and that such exchange would have been made and the inventions turned in for \$98,000 of that stock, had it not been for the opportunity to turn them in, at their own volition, to the Celebration Company at \$2,000,000 (less \$400).

It is true the court must put itself in the place, as far as it can, of the parties at the time of the transaction, and that the

fact that said inventions and the patents for the same after the lapse of ten years are still in the hands of the receiver, unsold, and that he was unable to sell them at any price, does not necessarily show that the inventions were worthless, or that the parties to the transaction knew that they were worthless at the time the transaction took place, but it must be considered as to those inventions (several of which it was claimed could be made useful for theatres and other shows of like nature) that the fact that they have remained without a purchaser being found therefor, for this long period of ten years, strongly tends to show that there was no intrinsic value to said inventions, or any of them. They appear to have become absolutely worthless, immediately upon the assignment to the receiver in May, 1893.

The evidence shows that in the building for the show that was planned and partially constructed, several of the inventions were not used and others could not be used; that the alleged inventions taken as a whole, for the purposes of the spectacular show to be given in that building, were practically of no value whatever. It must also be taken into consideration in judging of the good faith of this transaction, that the directors, Mackaye and his promoters, knew that the corporation had obtained no land, or right to any land, or site, for the projected building, and that it had no means of obtaining any money, except from its subscriptions.

Property taken in exchange for subscription money must be something substantial, capable of pecuniary estimation and not shadowy. A guess or an estimate as to the value of the right to use such inventions based entirely on speculative profits from the future use of such inventions, cannot in reason be held an equivalent for the nearly two million dollars which were due upon Mackaye's subscription.

It is impossible to arrive at any other conclusion than that there was practically but one side to this transaction, Mackaye and his assistants were simply making a sham trade between Mackaye and the corporation, using the corporation for their own personal ends in fraud of the creditors of the corporation. The language of the supreme court of Maryland in

Crawford v. Rohrer, 59 Md. 599, where there was a sham sale of property in payment of subscription for stock is pertinent to the case at bar: "Any arrangement between stockholders or those in charge of the affairs of the corporation, by which the stock is but nominally paid up, whether in money or property, the corporation not in fact getting the benefit of the price in good faith, will be regarded as a sham, and not as a valid payment as against the creditors of the corporation, however it may be regarded as between the corporation and the subscribers," and that "as between the creditor of the corporation and the original holders of the stock, it in no manner affects the rights of the former that the stock has been issued as fully paid up stock, for their rights depend, not upon the mere appearance of things, but upon the actual, *bona fide* payment by the stockholder, whether that payment be alleged to have been made in money or in money's worth."

The evidence shows that it was a part of the original scheme of Mackaye, Butterworth and Crosley that an amount of the stock that might be deemed necessary was to be returned to the corporation to be used for promoting the enterprise, which stock was to be held and used by the corporation practically as treasury stock.

Certificate No. 1 for 19,996 shares of stock was issued to Mackaye on May 21, 1892, nominally in payment of his subscription, and was, either upon that or the next day, returned to the Celebration Company, with a statement on the back in Mackaye's handwriting that he assigns 1,574 shares to Crosley; 1,574 to Butterworth, and "to myself 7,349 shares, and — shares," and, in the handwriting of White, the secretary, over an erasure written in said blank the figures, "9,499," and in pencil, also in White's handwriting, after the "9,499 shares," the words, "for promotion."

On the 17th of May, four days after the stock issued to Mackaye and the next day after its issue was authorized, the board of directors of the Celebration Company—only Mackaye, Butterworth and the two clerks being present—passed a resolution in substance reciting that the corporation "would

require for the purpose of effectually promoting • • • and carrying out the business for which it was organized, the sum of \$800,000, "and desiring to secure the same by a first mortgage, authorized a trust deed mortgage to be made to the American Trust & Savings Bank as trustee, on all its property to secure \$800,000 of its own mortgage bonds." And it also appears that on that or the next day a certificate issued to Crosley for 1,574, to Butterworth for 1,574, and to Mackaye for 7,349 shares, leaving 9,499 shares unissued.

On the 28th of July 1892 (which was after the Union League dinner), certificate No. 21 for 9,499 shares was issued to Mackaye, but was cancelled, Mackaye stating to the secretary that it was a mistake as there were a certain number of shares to be issued to a trustee, and used by the Celebration Company to promote the bond sales, but on the receipt which Mackaye gave to the secretary for the certificate so issued to him, there appears in White's handwriting, the words, "From the company." Nothing was done with these 9,499 shares until August 26th, when a certificate for 8,000 shares was issued and delivered to the American Trust & Savings Bank as trustee, and at the time of the delivery, the Celebration Company notified the bank that the 8,000 shares were to be held by the bank as trustee under the subscription agreement, and that under the subscription agreement bonds to the amount of \$500,000 had been duly subscribed for.

The American Trust & Savings Bank, at no time, knew Mackaye in connection with either the bonds or the stocks delivered to it. A memorandum of the secretary on the back of certificate No. 1 marks this balance of 1,499 shares issued to Mackaye as being "for promotion," and by a subsequent entry, that the 1,499 shares were issued the 8th of April, 1893, to Powell Crosley, trustee. • This issue of the 1,499 shares to Crosley appears to have been done by the corporation without any order from Mackaye. •

This and other evidence tends strongly to show that when the pretended transaction of receiving the right to use the inventions in payment of Mackaye's stock subscription took place, it was understood that a large amount of stock was to

be returned to the company, to be used "for promotion." It is clear from the testimony that at the time the subscription agreement was first signed by any subscriber, the \$500,000 of stock was a part of the stock held by the corporation for promotion, or, in other words, as treasury stock. The evidence shows that some of these 8,000 shares of stock were used by the corporation as collateral security, and that all identity of the 8,000 shares returned to the corporation by Mackaye was lost; that such shares were covered into the treasury and treated as unissued shares from the time they were so returned by Mackaye to the corporation.

Not only was there in fact no valuation of the inventions had, but there was nothing tangible to value, and the pretended exchange between Mackaye's liability for \$1,999,600 on his subscription for the right to use the inventions was a sham transaction, a device to give the stock the appearance of full paid stock so that a large proportion of it could be used for promoting the corporate purposes, and the balance be used by Mackaye, Butterworth and Crosley for their own purposes, without anything of actual value having been given for any of said stock. It was a transaction which was both fraudulent in law and fraudulent in fact.

The next question to be considered arises upon the subscription agreement referred to, by which, upon payment for bonds, the subscriber was entitled to receive in addition to the bonds, an equal amount of full paid and non-assessable stock. By that paper the subscribers agreed to take and pay for bonds to the amount set opposite their respective names on condition, "that the bonds be preferred in payment and draw interest at seven per cent. from date of subscription, and on the further condition that upon full payment being made, for the bonds so subscribed for, each subscriber shall be entitled to receive, and there shall be delivered to him by the trustee, the American Trust & Savings Bank, an amount of the full paid and non-assessable capital stock of the Columbian Celebration Company equal in par value to the par value of the bonds so by him subscribed and paid for." When the subscription paper was signed, where now appears the name

“American Trust & Savings Bank,” there was a blank, which was afterwards filled with that name, but such fact has no material bearing on the construction of the agreement. Several copies of the subscription paper were circulated, and signatures obtained thereto. The original subscription paper bears date July 6, 1892.

It is contended by certain defendants that the agreement designates no particular stock by number or by description other than that it shall be stock of the Columbian Celebration Company, and that as the \$800,000 of stock deposited with the American Trust & Savings Bank for the purpose of carrying out said subscription agreement was not, in fact, full paid and non-assessable stock, they were not bound to receive such stock as a compliance with said condition.

Neither the American Trust & Savings Bank, nor the Columbian Celebration Company signed the agreement, but the American Trust & Savings Bank subsequently accepted the position as trustee, and the Columbian Celebration Company received such subscription agreement and both acted under it.

It does not appear upon the face of the agreement that the stock was, at the time of the signing of the same, in the hands of the trustee (the evidence shows that it was not) nor is there any express obligation on the part of the Columbian Celebration Company to place any stock with the trustee, but it appears that it did (when, does not appear) receive the 8,000 shares of stock from Mackaye and deposited the same with the American Trust & Savings Bank for the purposes of said subscription agreement.

It is apparent upon the face of the subscription agreement that it was the intention that the trustee act as a mere conduit to pass the stock deposited with it to the subscribers upon the payment of their several bond subscriptions; in other words, that it was to hold said stock in escrow for that purpose.

It is also apparent that no particular shares of stock are designated, but if, in fact, the subscription agreement was executed with reference to any particular stock, it must be

admitted law that parol or other evidence is admissible to show with reference to what particular stock the agreement was made in order to identify the same. The question arises then, whether the evidence in this case shows that any particular stock (as, for instance, the Mackaye stock) was the identical stock as to which said subscription agreement was entered into. The evidence upon that point will be discussed later.

If such evidence shall be found to identify the stock which was to be delivered by the trustee as part of the same stock that had been issued to Mackaye, such identification would be a complete answer to the contention that the subscription paper itself does not identify the particular "full paid and non-assessable" stock that was to be delivered.

It is contended the agreement calls for "full paid and non-assessable" stock, to be delivered in the future, and if the stock deposited with the bank was not such stock, the Celebration Company was impliedly obligated to make it full paid before its delivery to the subscribers. Neither the bank, which was a mere conduit, nor the Celebration Company signed the agreement, but the latter accepted and acted upon it.

The subscription agreement containing no express undertaking by the Celebration Company that the stock which was to be delivered by the American Trust & Savings Bank should be "full paid and non-assessable" stock, or that the Celebration Company would make it such, the mere fact that the Celebration Company did receive such stock for Mackaye, and did deposit the same with the said bank for the purposes of said agreement, did not, under the circumstances in evidence, impose any obligation upon said Celebration Company to make such stock "full paid and non-assessable" before its delivery under said agreement.

It is also argued that, because the stock in question was marked "full paid and non-assessable" stock, the subscribers to the subscription agreement were not bound to look beyond the face of the stock or make any inquiry. That depends

upon the construction to be given the subscription agreement, taking into consideration all the circumstances under which it was executed.

The mere fact that the stock was issued as full paid stock did not make it so in fact.

The supreme court of the United States, in the leading case of *Upton v. Tribilcock*, holds that a promise to take a share of stock imports a promise to pay for it, and the same effect results from the accepting and holding a certificate of stock, and although the stock in that case was stamped "non-assessable," the court says: "We can see no qualification of the result from the fact that the stock was so stamped. The fact of stamping it 'non-assessable' did not make it so." *Upton v. Tribilcock*, 91 U. S. 45. See also *Crawford v. Rohrer*, 59 Md. 599.

It is also contended by some of the defendants that a court of equity will treat the money paid under the subscription agreement as paid upon the stock, as against the claim of creditors becoming such with knowledge that the stock was unpaid.

There is no equity in such contention. The right of the creditors is founded upon the statute, and the liability of the stockholder is also statutory. The law demands that that portion of the trust fund represented by the stock which is unpaid shall be paid to the creditor, and it is no answer to this demand, as expressly decided by our supreme court in *Sprague v. National Bank of America*, 172 Ill. 149, that the creditor knew at the time his indebtedness was created that the stock was unpaid.

Are the defendants who signed the subscription agreement *bona fide* purchasers for value? The master finds (page 33 of his report) as follows:

"I find from the evidence that all of the subscribers to the contract Exhibit 2 to Gardner's testimony (which was the subscription agreement) were informed of the fact that the capital stock therein contracted to be delivered on payment by them for the bonds, was to be given as a bonus, and that as a matter of law such subscribers were put upon inquiry

as to the character of the stock and the right of the corporation to so dispose of such stock at less than par. I therefore conclude that if such subscribers did not inquire as to how such corporation acquired such stock and whether or not it had been fully paid for, then the law holds them chargeable with that knowledge which a reasonable inquiry would have disclosed of the facts, to-wit: that said stock had never been paid for as required by law." If the evidence sustains the finding of the master no fault can be found with his conclusion. If the subscribers to the agreement (or contract, "Exhibit E") took the stock as a bonus, or became liable as stockholders having paid nothing for the stock they took it *cum onere*. If it was unpaid stock, they must pay for the same, and cannot claim to be purchasers of the stock for value.

The master does not pass on the question of whether, upon the face of the subscription agreement, the stock was a bonus, nor was it necessary for him so to do. His finding that it was a bonus is based upon all the evidence in the case *ex facto oritur lex*. The master's finding must be held to mean that under all the circumstances surrounding the execution of the subscription agreement, the subscribers were put upon inquiry as to whether this stock which they agreed should be theirs upon payment of the bonds, was in fact fully paid and non-assessable, and he construed the written agreement in the light of such circumstances.

It is not controverted that if the subscriber was informed of the fact at the time of or before the subscription, that said stock was not fully paid and non-assessable, or if he had notice of facts or circumstances which would put a reasonably cautious, prudent man upon inquiry as to whether said stock was, in fact, fully paid and non-assessable, and failed to make such inquiry, he is liable for the amount unpaid upon the stock received by him, or as to which he became the owner, legal or equitable.

It is contended that the subscription agreement is in law a purchase of both bonds and stock and that the stock is not a bonus or gift as contended by complainants. This involves

a construction of the agreement. The complainant cites authorities to show that the stock is to be considered a bonus or gift. The defendants cite authorities to show that it is to be considered as a purchase of bonds and stocks, and if the corporation owned the stock which it had once issued as paid up stock, it having again become the owner of it, it could sell it with the bonds for what it could obtain, like any other owner of stock.

There is much reason to contend, upon the Illinois authorities, that this is an agreement to become a stockholder, an agreement in the nature of a subscription for stock. No particular form of words is necessary to make an agreement to become a stockholder. If the contract amounts to an agreement to take from the company its stock, that is sufficient.

In *Alling v. Wenzel*, 133 Ill. 264, where by an ingenious system of bookkeeping the stock was transferred to and stood in the name of the corporation which afterwards sold the stock to different persons at ten to twenty cents on the dollar, the stock never having been paid for, the purchaser buying the same directly from the company, was held liable as an original subscriber for the amount remaining unpaid thereon. And in another case where a party signed an agreement in substance promising to pay a certain sum to a railroad company when a certain amount of construction was done, and upon the payment of the money a certificate of stock for a like amount to be issued to the promissor on demand, the court held that it was a subscription to the capital stock of the corporation, and not a purchase of stock. *O. & F. R. V. R. R. Co. v. Black*, 79 Ill. 262. To the same effect *Wemple v. St. L. J. & S. R. R. Co.*, 120 Ill. 196.

If it was understood or agreed at the time of the alleged exchange of the right to use Mackaye's inventions for the 19,986 shares of stock issued to Mackaye that he should return to the corporation the 8,000 shares, or that a sufficient number of shares for promoting the enterprise should be returned to the corporation, there was not in law any issue of the stock so returned. In any view of the transaction Mackaye returned to the corporation 8,000 shares of stock, which

the court has found he fraudulently and illegally obtained. He did not sell it back to the corporation nor did he obtain or claim any consideration for returning it to the corporation. The stock was put back into the treasury of the corporation, without anything being paid for it, going or coming, and the corporation, as to this stock, stood in the same position as if it had never issued the stock to Mackaye.

The corporation issued new certificates for these 8,000 shares, just as it would have issued them to an original subscriber for shares. There was no assignment to the bank nor to any subscriber of any of the original certificates issued to Mackaye. The original certificate issued to Mackaye, so far as this 8,000 shares was concerned, was treated as if it had never been issued. The legal effect of the subscription to the agreement was to make the signers thereto subscribers to the capital stock of the corporation upon the payment of their respective subscriptions for bonds, and liable as such stockholders under the cases above cited.

The "subscribers" were presumed to know that the corporation could not legally issue full paid stock to any one agreeing to become a stockholder without the same being paid for in money or in money's worth, and that issuing the stock as full paid and non-assessable stock, did not make it such so far as creditors might be concerned. Upon such construction the subscribers were not assignees, but subscribers for unissued stock and chargeable with the knowledge that the capital stock represented by such shares was a trust fund for creditors, and that all subscriptions for stock must be paid for in money or in money's worth. Either this must be held to be the true construction of the paper, or it must be held a subscription for (or purchase) of bonds. Upon either construction the stock was a bonus or gift, and being such the subscribers receiving the same, on becoming the owners thereof, legal or equitable (having paid nothing therefor) would be liable for the amount unpaid thereon and such subscribers would not, in either case, be *bona fide* purchasers of the stock for value.

Upon the face of the agreement, without considering the

surrounding circumstances, it is clear that the stock is a bonus or premium for the bond subscription, and there is no evidence tending to show that the agreement was intended or understood to be for the sale of bonds only, or a purchase of bonds and stock by the subscriber.

The trust deed to secure the payment of the bonds (with the contents of which the subscribers are chargeable) authorized by resolution of the directors of the Celebration Company, on the 17th of May, contains no reference to stock, and the agreement as to the stock was presumed to be made knowing that fact—it evidently was made without regard to the provisions of such trust deed. In fact, as will hereafter be seen, Mackaye had on the same date that he got certificate No. 1 for 19,996 shares or on the next day, returned the same to the corporation, and obtained new certificates as hereinbefore stated.

As to those defendants who signed the subscription agreement and paid for the sum subscribed for, but neglected or refused to accept of the stock; did they become the owners of such stock which had been deposited with The American Trust & Savings Bank upon the payment of the bond subscribed for? The true construction of the agreement upon this point is that the American Trust & Savings Bank held the stock in escrow, to be delivered to the subscriber for bonds when he paid for the bonds, and that, *eo instanti* upon such payment being made, the subscriber became entitled to the stock; that is, he became the owner of such stock, could have compelled its delivery to him, and would have been entitled to all the dividends thereafter earned by such stock. After such payment the stock was such subscriber's, and the bank held it for him and subject only to his demand.

It was not in the power of such subscribers to rescind the contract as to the stock and affirm it as to the bonds, nor could they, after their liability became fixed as stockholders (by the payment of the bonds), rescind such agreement, either in whole or in part, as against the creditors of the corporation.

As to those who refused or neglected to take either stock or bonds. The subscribers having paid for their bonds, as be-

fore stated, by such payment, became the owners of the stock deposited with the American Trust & Savings Bank, and thereby became liable to the creditors of the company as such owners of stock for the amount unpaid thereon; having incurred such liability they could not rescind the contract as against the creditors of the corporation. They occupied no better position than those who took the bonds but refused to take the stock.

The evidence fails to show any case in which the signer of the subscription agreement properly exercised any right to rescind the contract. The subscription agreement or contract was an executed agreement so far as the Columbian Celebration Company was concerned, and the liability of stockholders had attached to the subscribers to the agreement before any attempt was even made by any such subscriber to rescind the contract. When such attempt was made, the right of a rescission did not exist.

The evidence clearly shows that nearly all the signers of the subscription agreement knew, and that the others had notice equivalent to knowledge that the stock referred to in that agreement, either had been or was to be turned back to the corporation by Steele Mackaye, was a part of the stock which had been issued to him in payment of his subscription, and that it had been or was to be deposited with the American Trust and Savings Bank for the purpose of carrying out the subscription agreement.

Those who signed said subscription agreement and received stock or became stockholders by paying for bonds, contend that they are purchasers of such stock for value and without notice, that it was not what it purported to be, to-wit, full paid and non-assessable. The doctrine laid down in *Coleman v. Howe*, 154 Ill. 458, by our own supreme court upon this point, is as follows: "A purchaser or assignee of stock which has not been fully paid does not become liable to the corporate creditors for the unpaid balance where the stock has been issued as fully paid and he has acquired the same in good faith and without notice that it has not been paid. But where a person purchasing stock issued as paid up, had notice that

it has not been paid, his liability is the same as that of the party who transferred it to him. (Citing 1 Cook, Stock and Stockholders, 3 ed., secs. 49-50; *Jackson v. Traer*, 64 Ia. 469). The equitable doctrine, that the capital stock is a trust fund that may be followed by the creditors of the corporation, and that any balance remaining unpaid thereon may be reached, by such creditors, applies not only to original subscribers to the stock but also to purchasers or assignees with notice of the fact that all of the stock has not been paid for."

The court has held that the transaction by which the stock issued to Mackaye in payment of his subscription of nearly two million dollars in consideration of the right to use the inventions of Mackaye, was a fraud in fact and in law as to creditors, and that such stock was not paid for in whole or in part. Did the subscribers to the subscription agreement now sought to be charged as stockholders have knowledge of the fact that such stock was unpaid, or have notice of such facts or circumstances which would put a reasonable, cautious and prudent man upon inquiry, and fail to make such inquiry?

It appears from the evidence that as early as February, 1892, Steele Mackaye commenced to agitate at Chicago the proposition of building a great spectacular show, to be used in connection with the World's Fair, and the formation of a corporation that should build and run the same. Mackaye had made a model of the show, about sixteen by twenty inches, which he exhibited at the Auditorium, a leading hotel in this city. These exhibitions attracted a very considerable attention and were continued from time to time for a number of weeks and down to and after the month of July, 1892; that those exhibitions were carried on by Mackaye, who is characterized by one of the counsel as being "a man of oriental imagination and hypnotic power." The exhibition was accompanied with lectures by Mackaye upon the spectacular show and the History and Voyage of Columbus, scenes of which he intended to depict. It is evident that nearly all the signers of the subscription agreement attended these exhibitions and heard these lectures.

According to the evidence, Mackaye at some of these lec-

tures stated the fact that the capital stock of the Columbian Celebration Company, which it was proposed should build and run this show, had been turned over to him in payment of his inventions, and that in order to aid in erecting the building and putting the show in operation, it was proposed that the Columbian Celebration Company execute a deed of trust to secure eight hundred of its \$1,000 bonds, the proceeds thereof to be used in and about the erection of such building and putting such show into operation; and that he (Mackaye) should turn over to the Celebration Company, out of stock received by him, \$800,000 of stock, which should be deposited with a trustee; and that for every \$1,000 bond, which should be subscribed and paid for, an equivalent amount of such stock so deposited with the trustee, should be delivered as a bonus to subscribers for bonds. He also in these lectures dwelt at great length on the immense profits that were expected to be derived from the erection of this building, which was to cost not less than \$500,000, and perhaps \$800,000.

A prospectus was issued, entitled "The Spectatorium Prospectus," and was stated to be "a condensed presentation of facts which commend the enterprise to the prompt attention of investors as a perfectly safe investment with the certainty of an exceptionally large and quick return;" that the World's Fair would be an occasion that would never be again equaled as an opportunity for money making; that millions of people would crowd to Chicago during the exposition, and that an investigation would prove to any investor that the Spectatorium would be the most colossal and astounding attraction ever offered to the public anywhere, any time in the history of modern civilization; that it would present a most wonderful celebration of the great event commemorated by the Columbian Exposition. That George A. Pullman, Lyman J. Gage, and others endorsed the enterprise; that it was a golden opportunity for investment. In addition to these gentlemen, it referred to many others, all or nearly all of whom became subscribers to the subscription agreement, among them Mr. Butler, Mr. Ream, Mr. Ellsworth, Mr. Murray Nelson, Arthur Dixon, Franklin H. Head, E. W. Gillette, Mr. Weaver, Mr.

Eckhart, W. L. B. Jenney, and others, and that the Spectatorium would be a colossal structure, erected "to command the clientage of the continent for years to come." That a building would be erected or constructed for the production of the Scenario, a new order of entertainment, upon the most startling and sensational realism, with the most accurate scholarship and the loftiest idealism; that the money for the construction of the Spectatorium and the production of this vast spectatoria, entitled "The Great Discovery," would be raised by the sale of 800 first mortgage seven per cent. bonds of \$1,000 each, the bonds to be a lien upon the whole plant, and the sole right to use the wonderful inventions covered by ten patents," which had already been allowed by the patent office in Washington, which gave the Columbian Celebration Company the monopoly of the extraordinary entertainment for seven states," including Illinois; that the money received by the Columbian Celebration Company would pass through the hands of a trustee of the bondholders; that the treasurer of the trustee would have charge of all moneys received and paid out until the bonds were paid; that the first receipts over and above running expenses would be devoted to the paying off of the bonds; that every one purchasing a bond "would obtain in addition to the bonds an amount of the stock of the company equal to the amount of the bonds purchased." Refers to certain gentlemen who have consented to become directors of the Columbian Celebration Company, Lyman J. Gage, Charles H. Deere, Edward H. Butler, Egbert W. Gillette, George H. Fuller, John S. Runnells, W. D. Kerfoot, Honorable Benjamin A. Butterworth, Franklin H. Head, Henry E. Weaver and Steele Mackaye, but it appears that Gage, Deere, Fuller, Runnells and Kerfoot never became directors.

That the estimate of the profits shows that if the Spectatorium draws but one-half of the number of people per day that usually patronize the Barnum & Bailey show in ordinary times when there is no immense World's Fair crowd of sight-seers in the city, the company will pay all the bonds with interest in seventy days, and pay a dividend for the World's

Fair season of over eighty-four per cent. on \$2,000,000, that being the amount of the capital stock of the Columbian Celebration Company; that the money capacity of the Spectatorium at ordinary circus prices would be about \$15,000 for each performance; and, if necessary, they can give six performances a day; "if it does but half this business, it will pay off all the bonds in twenty days, and pay a dividend of 350 per cent. upon the capital stock." This prospectus is signed "Columbian Celebration Company, Room 53, Auditorium Building."

A copy of this prospectus was kept on file at the exhibition rooms and it appears to have been widely circulated.

The names of the prominent financial gentlemen referred to, undoubtedly gave great impetus to the movement.

On the 6th day of July, 1892, a dinner was given by Mackaye and Butterworth at the Union League Club, with the object of furthering the enterprise. At this dinner, Steele Mackaye and Butterworth, it appears made speeches and explained the undertaking, substantially as set forth in the prospectus, stating that the stock of the company had been subscribed for by Mr. Mackaye, and had been paid for by Mackaye by turning over to the company the right to use the inventions referred to, and that out of his shares of stock he, Mackaye, would return to the Columbian Celebration Company \$800,000 of the same, to be given as a bonus to the subscribers to the bonds. Mackaye talked for more than an hour; he made, testifies Mr. Lyman Gage, "one of his characteristic talks; it was like a poem. It was descriptive as his other talks had been * * * they were graphic, glowing and convincing as to the power and beauty of his great scheme." It appears that the financial part of his poem was "his estimate of the earning capacity of the show. He figured 18,000 people at each exhibition, of which there were to be two in the daytime and two in the evening;" 72,000 people, at fifty cents each, making receipts of \$36,000 per day.

It appears that Jenney also attended at that dinner, and made some remarks and estimates of the cost of the building. No definite estimate appears to have been given as to the cost

of the mechanism of the show, outside of the cost of the building, but it was estimated that the entire cost would be \$500,000, and could not exceed \$800,000, the amount of the bonds to be secured by the trust deed upon the property of the Columbian Celebration Company.

All, or nearly all of the gentlemen named in the prospectus, and quite a number of other substantial citizens (in all forty or more) were present at this dinner. Considerable enthusiasm prevailed, presumably caused by the glowing pictures given by Butterworth and Mackaye of the Spectatorium show that was to be exhibited and the immense profits which would necessarily result to those investing in the bonds. The evidence does not show just how much of the bonds were subscribed for upon that evening, but it was between \$130,000 and \$150,000.

The evidence shows that neither at that time, nor at the exhibitions and lectures given by Mackaye, was there any inquiry made as to whether the inventions of Mackaye (or the right to use the same) were worth the \$2,000,000 (less \$400), which the Columbian Celebration Company had nominally given for the same; nor was any discussion had in regard to the monetary value of such inventions, or any one or more of them.

The master finds from the evidence that all of the subscribers for bonds for which stock was given as a bonus upon payment of the bonds, were informed of the way in which such stock was purported to have been paid for, viz.: by the agreement to assign interest in the patents of Mackaye; and most, if not all, of them believed that such interest in patents so assigned constituted full payment without reference to any actual value of such patents or interest therein, and that this is also true of the other holders of stock.

I do not agree with the master in his conclusion that most, if not all, of such subscribers believed that such interest and patents so assigned constituted full payment without reference to any value of such patents or interest therein.

I fail to find any evidence of inquiry by any such subscribers or any discussion by any of them, as to whether the in-

ventions were worth the \$2,000,000 (less \$400) paid for them by the cancellation of Mackaye's subscription. Nor was there any real discussion that I have been able to find from the evidence by any party, or any such subscriber, as to the value of any one or more of such inventions.

There is some evidence tending to show that George M. Pullman made some inquiries concerning the enterprise before he subscribed his \$50,000 of stock, but the evidence is of such an indefinite nature as not to warrant the conclusion that it was an inquiry into the value of the inventions as payment for the Mackaye stock.

The conclusion that I draw from the evidence is, that the subscribers signed said subscription paper in the belief that the enterprise would prove a success, notwithstanding all its capital stock was given for the inventions; that none of them ever stopped to consider the question of value of the inventions or of any one of them.

The showing made by the promoters and by the prospectus as to the great profits to be realized from this enterprise—that the bonds, with interest, could be paid by the receipts in seventy days during the World's Fair and that the stock would earn dividends even to three and one-half times the face value of the bonds, and might earn a great deal more, etc.—had the effect to obscure and blind the inquiry of investors in the bonds as to whether the alleged inventions of Mackaye were, in fact, worth the amount of his subscription, viz.: \$1,999,600, or as to what, if anything, they were really worth. The desire to realize such immense profits upon their investment apparently made the investors in bonds reckless or indifferent as to whether the capital stock (that trust fund for creditors) had, in fact, been paid into the corporation treasury in money or in money's worth; made them confident (even if the query as to whether the capital stock had, in fact, been paid for, suggested itself to them) that the venture would so certainly be successful that no possible danger as to the liability of creditors would be incurred.

Even if it be admitted that the signers of the subscription agreement honestly believed that the capital stock had been

fully paid for by the transfer to the corporation by Mackaye of the right to use his inventions, that would be an insufficient defense.

The court concurs in the master's finding upon that point, "that in order that such a belief should be available as a defense, that it must be based upon a statement of fact which the purchasers believed to be true, and which facts, if true, would constitute a sufficient payment of such stock. A mere statement of a conclusion either of fact or law by a third person is not in itself a sufficient foundation for a belief, which the law will recognize as relieving such persons from liability, but the facts from which such conclusion is arrived at must be considered."

The same reasoning will apply to the contention that it is sufficient if the defendants acted in good faith in signing the subscription agreement. It was doubtless the fact that the signers of such agreement, in good faith, believed that the enterprise would be a success, but that would be no defense if, as the court has found, they had knowledge or notice equivalent thereto, that this stock had not been paid for. *Higgins v. Ill. T. & S. Bank*, 193 Ill. 400.

The contention of some of the defendants, that the rule laid down by our supreme court in *Coleman v. Howe*, 154 Ill. 458, that the subscription to the capital stock of a corporation must be paid in money or in money's worth, is modified or changed in any way by the decision in *Sprague v. National Bank of America*, 172 Ill. 149, cannot be sustained. In the latter case the court says: "We entertain no doubt but that a corporation organized under the laws of Illinois, may issue shares of its capital stock in payment of property of such a character as it may lawfully possess and use, and may agree with the subscribers as to the value of such property, providing the agreement is made in good faith and in the exercise of judgment fairly and honestly directed.

In the *Coleman* case the court say: "Cases may arise where stock is issued for property taken at an overvaluation, which will justify the courts in compelling the stockholders to respond to the creditors for the par value of the stock less the

actual value of the property taken in exchange for it. Such will not be the case where there is entire good faith in making the valuation. But, if the property contributed is not valued in good faith, the shares of stock will not be fully paid up, either in law or fact, by the contribution of such property," and cites with approval the case of *Wetherbee v. Baker*, 35 N. J. Eq. 501, where it is declared that: "The courts have inflexibly enforced the rule 'that payment of stock subscriptions is good as against creditors, only where payment has been made in money or what may be fairly considered money's worth.' " In the same case (Coleman case) there was also a transfer of patents, and a prospect of future profits from the business. In that case it is further declared that: "A purchaser or assignee of stock, which has not been fully paid, does not become liable to the corporate creditors for the unpaid balance, where the stock has been issued as fully paid, and he has acquired the same in good faith and without notice that it has not been fully paid."

The Coleman case, 154 Illinois, and the Sprague case, 172 Illinois, both hold that good faith is a necessary element in any transaction where property is taken in payment of subscriptions to a corporation. Both cases sustain the position that where there is an overvaluation, combined with a failure to exercise any judgment as to the value of the property taken, or where there is an intentional overvaluation of the property or where the circumstances show that the transaction as to the exchange of the property for the shares of stock, was a mere fraudulent device; that it must be held there was an entire absence of good faith and that the transaction will be held fraudulent in law and in fact. Also, "That any one purchasing stock issued as 'paid up' with notice that it is not paid up stock or with notice of facts connected therewith, his liability is the same as that of the party who transferred the stock to him."

It is insisted by some of the signers of the subscription agreement that they did not attend any of Mackaye's exhibitions and hear his lectures there or at the Union League dinner; and, therefore, they are not chargeable with the same

knowledge as others who did. They claim they had a right to presume that the stock referred to was full paid stock which the corporation had once issued and subsequently had acquired the ownership of, and therefore they were innocent purchasers without notice and for value.

Those who signed the subscription agreement to take the bonds of the Celebration Company, do not stand in the position of purchasers for value in the open market. That is, they do not stand in the same position as one would who would buy fully paid and non-assessable stock upon the stock exchange. They were dealing directly with the Celebration Company, and in signing the agreement were making a special agreement with that corporation.

What, if any, is the presumption as to the stock referred to in the agreement? The presumption is that the stock referred to in the subscription agreement was stock that had been issued as full paid stock, and had subsequently been legally acquired by the corporation, or that the stock of the corporation was to be issued on payment for the bonds as full paid and non-assessable, without the corporation receiving any consideration therefor.

It is argued that it is no unusual occurrence for a corporation to acquire its own stock and afterwards sell it for what it can get. If a proposal like this had been made, by an old established corporation, in active business for years, and with so large a capital stock that \$800,000 of it would be a very small proportion thereof there might be some ground for the contention of defendants, but that was not this case.

The subscribers are presumed to have known the amount of the capital stock of the Celebration Company, the purpose, and all that is set forth in its charter, as well as the law of the land governing such corporations. Its name, without reference to its charter, indicated that it was intended to be used in connection with the World's Fair of 1893. A person does not buy bonds as he would a basket of eggs. Investors are not supposed to deal with a corporation for its bonds or stock with their eyes shut. The subscribers to the agreement were also chargeable with notice of the contents of the first mort-

gage securing the bonds, as the subscription agreement itself recites that the bonds were to be first mortgage bonds, and to be made preferred in payment. First mortgage upon what?

The mortgage deed itself (with contents of which they are chargeable) informed them that the trustee in the mortgage trust deed made to secure the bonds, was the American Trust and Savings Bank, and that the mortgage itself (excepting the right to use Mackaye's inventions) described no specific property, but was of all the property, assets, franchises, etc., of the corporation then owned by it, or to be further acquired.

This right to use the inventions is stated in the trust deed to have been secured by a certain contract recorded in the patent office at Washington. This recital charged the subscribers for bonds with notice of the contents of said contract, which contract showed on its face that it was made before any application for the patents for said inventions were filed.

This, with other circumstances referred to, were sufficient to put a reasonably prudent and cautious man upon inquiry as to the good faith of the transaction recited in said contract or agreement, and were sufficient of themselves to put such subscribers, persons receiving the bonds, upon inquiry as to what property the company owned, what was its value, as to whether its capital stock was paid up, and if so, how; also as to the value of the right to use the patents and the good faith of such alleged sale of the inventions to the corporation. As this company was but sixty days old and the money to be raised by the bonds was intended to start it in business, the matters heretofore recited were sufficient to put the subscribers upon inquiry as to how the corporation obtained or could expect to obtain \$800,000 of its full paid stock, to carry out the subscription agreement.

This inquiry, upon which the subscriber was put by reason of the facts recited in the opinion of the court, would necessarily have led the subscriber to the knowledge that the stock that was deposited, or to be deposited, with the American Trust and Savings Bank, was part of the stock which had

been illegally and fraudulently issued by the corporation to Mackaye in pretended payment of his subscription, and, that the same had been returned to the corporation without cost, to be used as a bonus for the bonds, and had never been paid for by any person.

The fact that a corporation not sixty days old, never having done any business, with capital stock subscription of \$2,000,000, purposes to put on sale \$800,000 first mortgage bonds with which the purchaser of the bonds was to get an amount of full paid stock equivalent to the bonds purchased, was of itself, in the opinion of the court, sufficient to put any reasonably cautious and prudent investor upon inquiry as to whether it was full paid stock.

As to defendants whose original signature to the subscription agreement is not produced in evidence; it appears that a number of the copies of the subscription agreement which was signed so largely at the Union League Club dinner, were circulated for signatures. All of them have not been produced in evidence, although the names of parties who, it is alleged, signed the missing copies, appear on the books or papers of the Celebration Company as subscribers for bonds. There is other evidence also as to who became subscribers for bonds, other than the subscription papers themselves.

It appears by the record of proceedings of the Celebration Company, that on the 23rd of May, 1892, the increase in the number of directors was approved, and that a meeting to elect the additional directors was held on August 17 at which E. B. Butler, E. W. Gillette, F. H. Head, J. Foster Rhodes, H. E. Weaver and Murray Nelson, defendants in this case, were elected such six new directors.

On the 25th of August following, the executive committee of the directors reported to the board that the subscription for bonds had reached \$500,000, and the secretary was ordered to issue a call for the ten per cent. thereof to be paid September 5, 1892.

September 9, 1892, the directors of the Celebration Company adopted a resolution directing the American Trust and Savings Bank, as to what course it was to pursue in the delivery

of bonds and stocks deposited with that company as trustee, and the resolution sets out the subscription agreement in *haec verba* and directs the bank that whenever a subscriber presents a certificate of the secretary of the Celebration Company, that he has paid to the treasurer of the Celebration Company the full amount of his subscription, the trustee should deliver to such subscriber the number of shares subscribed for by him and in addition thereto, shares of the Celebration Company's stock equal to the amount of said bonds and take his receipt therefor, and report to the Celebration Company the names of subscribers to whom bonds were delivered, the date of delivery, the number of the bonds, and the accrued interest endorsed thereon.

The methods pursued by the American Trust and Savings Bank and the Celebration Company, in connection with said bonds and stock, necessarily resulted in the books of the two companies showing who paid for the bonds, and when payment was made; whether the subscribers took bonds only or took bonds and stock; who had been certified by the Celebration Company as having paid his subscription in full, and who had received bonds and who had received stock. The American Trust & Savings Bank was the trustee of the subscribers and acting for them, as well as for the Celebration Company.

It also appears that the subscription agreement provided, in substance, that payment for the bonds should be in not less than five calls, and it appears six calls were made, one each in September, October, November and December of 1892, and January and February, 1893.

The books of the corporation therefore would and do show who responded to these calls and when the same were paid, when bonds were paid in full, and the issue of a certificate to that effect to the bank by the Celebration Company.

While it appears that the Celebration Company from the time the 8,000 shares were returned or donated to it, the corporation treated the same as being its own property, it nowhere appears that it had any other shares of stock than said 8,000 shares.

It also appears that the Celebration Company pledged some of said 8,000 shares of stock (not exceeding in all 200 shares) as collateral security upon some contracts and loans, but there is no finding by the master as to any defendant being liable upon any of the shares so pledged.

There is no evidence in the record that the American Trust and Savings Bank acted as trustee in the sale by the Celebration Company of any of its bonds to any person except under the subscription agreement. It also appears from the evidence that in April, 1893, it having become apparent that unless more money was raised, the projected building for the show could not be completed, the directors of the Celebration Company passed a resolution that the three hundred thousand dollars (the balance of the \$800,000) of bonds remaining unsold, should be made preferred in payment, provided four-fifths of the holders of the \$500,000 bonds subscribed for should consent thereto, and a consent paper was circulated among the subscribers for the \$500,000 of bonds to which a large number of such subscribers signed their consent, but not quite four-fifths in amount.

A subscription agreement to take such preferred bonds was started, and signed by Pullman and others, but signers for only about one-tenth of the amount necessary were obtained.

This last mentioned agreement was to the effect that the subscribers for the preferred bonds were to receive each \$2,000 of stock on payment of a thousand dollar bond.

This evidence, together with the evidence contained in the books and papers of the Columbian Celebration Company and the American Trust & Savings Bank, as to the several calls for payment on the bonds, on parties as subscribers to said subscription agreement, and as to who responded to such calls and as to who paid for such bonds, who were certified to as having paid for bonds in full, and also as to who gave receipts for bonds and stock or bonds only, together with evidence in the record from said books and papers, are sufficient proof as to all defendants against whom the master has found as signers of said subscription paper, and whose signatures to such subscription paper were not admitted or not proven

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by reason of the loss of some one of the copies to which the same were affixed.

As to those defendants who held stock not part of the 8,000 shares returned by Mackaye to the Celebration Company; it appears that on May 22nd, 1892, one day after the 19,995 shares appear to have been issued to Mackaye, the stock was held as follows: Edmonds, 1 share; White, 1 share; Mackaye, 7,349 shares, certificate No. 6; Butterworth, 1,574 shares, certificate No. 7; Crosley, 1,575 shares, certificate No. 8, a total of 10,500 shares, leaving 9,499 shares in the treasury unissued, but a part of certificate No. 1 for 19,996 shares originally issued to Mackaye, which certificate No. 1, was left with the secretary with no directions as to whom said balance of 9,499 shares should be issued.

As before stated the shares appear to have been returned to the corporation, to be used for promoting the enterprise, and of this 9,499 shares, there was issued 8,000 shares to the American Trust and Savings Bank, and this was done without any order on the part of Mackaye appearing by the record. These 8,000 shares were deposited, as before stated, by the Celebration Company, with the American Trust and Savings Bank, for the purpose of carrying out the subscription agreement for the bonds. The evidence shows that the American Trust and Savings Bank did not know Steele Mackaye in the transaction as to the 8,000 shares, but dealt solely with the Celebration Company.

The balance of the promotion stock, to-wit, 1,499 shares, passed by certificate in the hands of Crosley as trustee, and he subsequently surrendered the same to the corporation, and ordered 500 shares thereof issued to Butterworth as trustee, and 999 shares to himself as trustee. These issues of the 1,499 shares all appear to have been done without Mackaye having anything to do with the same, and by the company of its own motion.

This leaves the 10,500 shares of stock, which were not used for promotion purposes, to be considered, to-wit: Certificate No. 6 for 7,349 shares to Mackaye; certificate No. 7 for 1,574 shares to Butterworth; certificate No. 8 for 1,575 shares to

Crosley; certificate No. for 1 share to White; certificate No. 1 share to Edmonds, making a total of 10,500 shares.

The parties who became owners of these 7,349 shares issued to Mackaye, appear by the stock book to have been the following: Steele Mackaye, B. Butterworth, F. B. Carpenter, C. R. Gillette, E. W. Gillette, C. Bell Johnson, B. A. Eckhart, E. L. Brewster, C. W. Upton, Henry E. Weaver, Dudley H. Rood, Sarah S. Peavey, Mary M. Mackaye, J. Foster Rhodes, Helen Lane Mackaye, Harold S. Mackaye.

Certificate No. 7, issued to Butterworth, 1,574 shares, of this stock, appears to have been owned subsequently by the following parties: Benjamin Butterworth, Clarence R. Gillette, E. W. Gillette, George C. Gray, J. Foster Rhodes, George M. Drake, Henry E. Weaver, E. B. Butler and H. Knapp.

Of the original certificate No. 8 for 1,575 shares issued to Crosley, 450 shares were assigned to Butterworth as trustee.

Mackaye, Butterworth and Crosley were the original promoters of this scheme for putting this 10,500 and other shares upon the market as full paid shares, when, in fact, nothing had been paid thereon. They are responsible on all of said stock held by them except such as was transferred to them for promotion of the enterprise.

Mackaye and Butterworth have both deceased, and were non-residents of this state. Neither they nor their representatives are brought into court in this case, so that no personal decree can go against them.

Harold S. Mackaye, Helen Lane Mackaye and Mary M. Mackaye paid nothing for the stock assigned to them by their father and are also non-residents of the state, and no personal service has been had upon them.

Henry E. Weaver was very active in promoting the sale of the stock of the Celebration Company, and from the evidence it appears that he must have known that the stock which passed into his hands was unpaid stock. He is liable upon all such stock jointly with those to whom he transferred the same, and individually liable upon all stock held by him which was unassigned. It appears from the evidence that he has

made an assignment for the benefit of his creditors, and the presumption is that nothing can be collected from him.

As to E. W. Gillette and C. R. Gillette and J. Foster Rhodes, I have carefully read all the evidence touching their connection with this stock. It is shown that they were all three very early in the enterprise interested in promoting the same. In fact, they were so active before the corporation was chartered, and no candid reader of the testimony can doubt for one moment that each of them knew that the stock had not been paid for, and that the issuing of the same as full paid stock was in bad faith and a fraud upon those who might become creditors of the corporation. The court has no hesitation in confirming the report of the master as to E. W. Gillette, C. R. Gillette and J. Foster Rhodes.

The same ruling must be made as to B. A. Eckhart. The master's report as to his liability must be confirmed; also as to his being jointly liable for the stock issued in the name of C. Bell Johnson.

E. B. Butler, the evidence shows, did know or should have known, all about the fraudulent issue of the stock, and shows he paid nothing for the 450 shares issued to him, the same being a present to him from Butterworth. He transferred 45 of them to one H. Knapp, who, in his evidence knew that the stock was not paid for by any person. Knapp is a non-resident and no decree can go against him personally. Butler is jointly liable with Knapp on the shares he transferred to the latter.

George M. Drake, assignee of E. W. Gillette, claims to have purchased \$15,000 worth of stock for 20 cents on the dollar, giving his note for same, with stock as security. I concur with the master that Drake is liable as assignee, and Gillette as assignor of said stock. If the transaction between the two was not a mere cover for Gillette, Gillette knew and Drake had notice of facts sufficient to put him upon inquiry and could have known the same if he did not, in fact, know the same.

George C. Gray was a clerk for J. Foster Rhodes, and it ap-

pears from the evidence he paid Rhodes nothing for the stock and took the same for Rhodes, who is the real owner thereof. They are jointly liable on the 120 shares of stock transferred to Gray.

As to all said named parties (except Carpenter, Upton, Reed, Peavey and Brewster) who held shares of stock embraced in certificates Nos. 6, 7 and 8, and which were not a part of said 8,000 shares returned by Mackaye to the corporation, it is unnecessary to discuss further in detail the evidence bearing upon their liability on stock held by them respectively, either as assignees or assignors.

I have studied the evidence carefully as to each defendant, and am satisfied that it is sufficient to show that they (respectively) either had actual notice that the stock acquired by them respectively, was unpaid stock, or that the circumstances under which they respectively acquired the same, were sufficient to put them upon inquiry which would have led to such knowledge, and that the master did not err in finding them liable for stock as he in his report herein has found.

Several certificates appear to have been issued to F. B. Carpenter upon the order of Steele Mackaye, and receipted for by Mackaye. Upon the back of one certificate appears an order from Carpenter to the secretary of the Celebration Company, to deliver all certificates standing in his name to Steele Mackaye. It appears from the evidence that the Celebration Company received no consideration for the certificates issued in Carpenter's name and that he was transferee of Steele Mackaye, which stock was not paid for.

The complainant, having shown that the original stock, of which that issued to Carpenter was a part, was unpaid stock, and that nothing was paid upon the stock at the time it was issued to Carpenter, it put the burden of proof upon Carpenter to show that he was a purchaser for value without notice. This he failed to do, and must be held liable upon certificates No. 187 for 150 shares, No. 94 for 45 shares and No. 88 for 5 shares, transferred to him by Steele Mackaye.

As to the stock issued in C. W. Upton's name, 40 shares—that to Dudley H. Rood, 5 shares, and to Sarah A. Peavey,

50 shares, the evidence that they ever held the stock is by no means convincing, and if they did, that they knew it was unpaid stock is unsatisfactory, and the finding must be in their favor.

The evidence on the part of complainants tends to show that certificate No. 282 for 100 shares was issued from certificate No. 273. Steele Mackaye owned No. 273 for 100 shares issued the 22d of April, 1892, and it appears, returned it to the company with an assignment on the back directing it to be re-issued to E. L. Brewster. The name of Brewster on the back of the certificate appears to have been written over Steele Mackaye's. On the 28th of April, 1893, certificate No. 282 appears to have been issued to E. L. Brewster, and like erasures and writing of Steele Mackaye's name in place of Brewster's appear as to this certificate. This last certificate appears to have been returned to the secretary of the Celebration Company, and cancelled, upon May 2d, 1893, (as issued by mistake) which was after the failure of the enterprise became known.

Brewster was a broker and was active in inducing others to subscribe for the bonds of the corporation, and clearly, from the evidence, it must be admitted knew or should have known this stock was not paid for. I cannot find any evidence of Brewster or other evidence in the record, denying that Brewster was the owner of this certificate. He was not, so far as I can discover, asked, nor did he testify particularly as to his connection with this certificate. His failure to do so, although he was on the witness stand, must be held insufficient to overcome the evidence tending to show that he owned this certificate. His general denial that he was a stockholder in the corporation is not sufficient.

John J. Mitchell subscribed for \$5,000 of bonds at the request of Brewster, paid for the same but never took either bonds or stocks. Under the rulings I have made he is liable as a stockholder unless his plea of the statute of limitations can be held a good defense.

It appears to be admitted that if the statute of limitations had commenced to run when the insolvency of the Celebration

Company occurred and before the commencement of this suit (both of which occurred in the month of May, 1893), that the defense of the statute of limitations is a good one. Mitchell was made defendant when the suit was commenced and a demurrer having been put in to the bill and having been sustained, an appeal was taken to the appellate court, which court reversed the judgment of the lower court and remanded the cause with directions to overrule the demurrer. Mitchell was not notified as required by law of the re-docketing of the case in this, the circuit court, and more than five years elapsed between the time he was again summoned to appear, and the insolvency of the Celebration Company.

The question is, whether the statute commences to run from the insolvency of the corporation, or from the time that a decree should be entered in the cause, declaring what indebtedness of the corporation remains unpaid, what are its assets, who are stockholders and what amounts remain unpaid upon their stock, the deficiency (or approximately) so to pay debts. That whether inasmuch as the issue of the capital stock to Steele Mackaye in payment of his subscription was good as between him and the corporation, that transaction must be set aside before any liability of the stockholders accrues.

It must be admitted that there must be a decree that there is unpaid stock, who are liable for the amount unpaid, and that there must be a deficiency of assets to be paid creditors, and that stockholders can only be held *pro rata* for the amount of such deficiency, if it be less than the total amount unpaid upon the stock. At common law, some of these defendants charged as stockholders, those who had transferred their stock, could not be held liable, but they are made jointly liable with their transferees until the stock is paid.

The jurisdiction of this court in the suit at bar depends entirely upon section 25 of the corporation statute, because it is brought by simple contract creditors. A judgment creditor who has exhausted his remedy at law, has a standing in equity to pursue all the property and choses in action belonging to his debtor which is held by others for him. He may by creditor's bill equitably attach all rights and credits of his debtor and have them applied in satisfaction of his judgment.

A simple contract creditor has no such standing in a court of equity, and only acquires a right to bring a bill of this nature against a stockholder by virtue of section 25 of the incorporation act. Therefore, he is pursuing a remedy created by statute.

The case of the *Great Western Telegraph Company v. Gray*, 122 Ill. 630, is but little in point, as it was under the law as it existed prior to the enactment of the present section 25 referred to. As the law then stood, the stockholders were not necessary parties to a bill.

The decree in the case in the 122 Ill. was, that the receiver proceed to collect the assessment and it was in a suit at law by the receiver against Gray that the statute of limitations was invoked. The court held that as the directors had failed in their duty to make the assessment the court could make it; that no right of action arose until such assessment was ordered made, and therefore the statute of limitations did not commence to run until such decree or order was made by the court.

So far as the complainants' rights as simple contract creditors to commence this suit is concerned, it exists merely by force of the present statute. Their feet stand upon section 25 of the corporation act. Blot out section 25 and their right to be in this court seeking the relief prayed disappears. Section 25 gives them their only right to be here as complainants.

The defendant Mitchell, so far as the plea of the statute of limitations is concerned, was not brought into this case until more than five years after this suit in equity was commenced. The plea admits a right existed to sue defendant, but alleges complainants did not commence this suit against him until more than five years after the time the cause of action, the right to commence this action against him, arose. The cause of action and right to commence suit must co-exist. The appellate court of this district, by Judge Adams, has, since writing the above, made a decision upon this question of the statute of limitations in suits of this nature which is precisely in point. It is the case of *Parmelee v. Price*, 105 Ill. App. 271.

As to estates of deceased stockholders. What is the effect of the two years' statute of limitations for filing claims against the estates of decedents? In all cases where the stockholders

were brought into court and afterwards deceased and the suit was revived by bringing in the executor or administrator at any time within the general statute of limitations, a decree would go against the executor or administrator if he was brought into court within two years time from the date of issue of the letters of administration; that the amount found due from the deceased stockholder should be paid in regular and due course of administration. If the executor or administrator is not brought in either by way of revivor or by original suit, within two years time of the issuing of his letters of administration, the only decree that can be made is that the executor or administrator pay the same out of assets discovered or inventoried, after the expiration of said two years.

The two years limitation is only a limitation upon the right to participate in the assets of the estate which have been inventoried within the two years from the taking out of letters for the administration of the estate.

The case of *Morse et al. v. Pacific Railway Company*, 191 Ill. 356, states the law applicable to this class of cases clearly and fully and should be followed in drawing the decree.

It is contended that The American Trust and Savings Bank should be held liable as trustee holder, for \$239,000 of stock, part of the \$800,000 deposited with it by the Celebration Company to carry out the subscription agreement referred to.

It must be admitted that the evidence clearly shows that neither The American Trust and Savings Bank or the Celebration Company intended by the transactions between them as to this stock, that the bank should acquire any ownership or interest in or control over the stock deposited with it, other than to hold the same in escrow for the parties that were or should become entitled to it.

A party holding stock in escrow incurs no liability as a stockholder. The action of the bank was not *ultra vires*, but by acting as a mere conduit or stakeholder, to hold in escrow, it incurred no liability because what it held was unpaid stock.

It is contended that the 3,000 shares of stock not required to carry out the subscription agreement, that as to those shares

the bank held the same for the Celebration Company and not for delivery to subscribers for bonds. At the time the 8,000 shares were deposited with the bank it was supposed that the whole might be necessary to be used for carrying out the subscription agreement, and it makes no difference that there was not then any *cestui que use* as to 3,000 of the bonds. It was not known, and could not be known, whether or not all of the 8,000 bonds would or would not be sold and the whole stock issued in connection with such sale. That the Celebration Company became insolvent and the 3,000 shares were not required to aid in the sale of the bonds, cannot make the bank liable, and its position in regard to said shares was the same then as when it received the stock.

It would be manifest injustice to hold the bank liable for the stock in question when it never intended to acquire any interest, right or control of the stock or any part of it as a stockholder.

The finding of the master that The American Trust & Savings Bank never subscribed for or in any way agreed to or did become the owner of any stock of said Columbian Celebration Company; that it had no interest in said 8,000 shares of the stock other than as a conduit through which said Columbian Celebration Company could conveniently separate and transfer the same in accordance with its own plans and arrangements, and that the said bank is not the holder, assignor or transferer of any stock of the Columbian Celebration Company, within the meaning of the twenty-fifth section of chapter 32 of the Revised Statutes and hence is not liable thereon, is in all respects confirmed.

Upon the question whether the claims of the holders or owners of the bonds issued under the subscription agreement, should be allowed, as claims against the insolvent Celebration Company, and if so allowed, can such claims be set off against the liability of the stockholders holding bonds and if not allowed as set-off should such claims be postponed to the claims of other creditors not stockholders, or should they stand upon an equal footing with such other creditors?

I have given this branch of the case that careful examina-

tion which its importance demands. I shall not discuss the authorities cited by the respective counsel. The questions involved are not (except as to the right of set-off), free from difficulty, but upon a careful review of the argument of counsel and the many authorities cited, I have come to the conclusion that the findings of the master in regard to the same are correct.

It is clear upon the authorities that the claims of the bondholders cannot be allowed as a set-off. In order to have a right to the assistance of a court of equity, they must first do equity by paying for the stock issued in connection with such bonds.

As to whether their claims should stand upon an equality with the claims of other creditors, presents a far more difficult question.

If these bondholders had paid for the stock when they took their bonds, there would be no question of their right to participate in the assets of the insolvent Celebration Company. If they now pay for the same, why is not their right of equal participation as great now as it would have been if they had paid for the stock when they received the stock and bonds?

But it is contended that they do not come into equity with clean hands, and the maxim that "He that doeth iniquity shall not have equity" is evoked against their right to participate upon an equality with other creditors. This case is peculiar. There were no creditors when these bondholders entered into the subscription agreement, nor when they respectively took their bonds and stock. There was no actual fraud as to these creditors at that time, because they were not then creditors. The fraud that was committed in taking the stock without paying for the same was a fraud upon the law, although a valid transaction as between the bondholder and the Celebration Company. The creditors were not parties to the transaction and the fact that the law gave the subsequent creditors a right to pursue the holders of the stock, and compel them to pay for the same, cannot in my opinion, be held to be such "iniquity" as would justify the court in declaring that they should not as creditors stand on an equality with other subsequent creditors of the corporation.

The corporation had the money of these bondholders and also received the consideration that other creditors gave them for the debts owing them. Why should not these two classes of creditors stand, as to the assets of the corporation upon the same footing as they would have stood had the bondholders paid for their stock when they received it? Whatever fraud there was upon the law in taking stock without paying for the same, they have made good the wrong done when they now pay for the stock.

The principle that equality is equity or as Story has it "equity delighteth in equality" underlies the whole doctrine of equity as administered in the settlement of insolvent estates, and the marshaling of assets, and is of very wide range. In my opinion, as between such bondholders and their creditors, there is no estoppel and the principle of the maxim that "He who seeks equity must come into equity with clean hands" cannot be invoked to prevent the application of what might be termed the universal rule of equity in the settlement of insolvent estates, that all creditors shall share equally in the assets. As the bondholders are to share with other creditors in the assets it is evident that full payment of the stock will be required.

It is true that admitting the bondholders to share in the assets will, in this case, leave the other creditors with a portion of their debts unpaid, but such might have been the result if the bondholders had paid for their stock in the beginning. They are all creditors as between them and the corporation by valid and binding contracts and stand upon an equality as to their rights to share in the insolvent's assets.

So far as the rights of bondholders to share equally in the assets of the corporation, the bonds and stock taken with the bonds are inseparably connected in their equities in this case. The bonds, or payments on account of bonds, of Mitchell or others who escaped paying for the stock allotted with such bonds, should not be allowed to share on an equality with other creditors.

The master is confirmed in his findings that no bond creditor should be allowed to share equally in the assets with other creditors, until the stock given with such bonds shall be first

paid. Such payment should be a condition precedent to the right to invoke the maxim that "Equality is equity," because, "He who seeks equity must first do equity."

In conclusion it is sufficient to say that the master's finding in regard to the rights of the holders of bonds to prove the same and share equally in the assets, is confirmed in all respects. It will be seen that the result is that the court confirms the master's finding as to the liability and joint liability of all defendants whom he finds became holders of the stock of the Celebration Company, issued in connection with the subscription agreement.

Also the master is confirmed in his holding as to the individual and joint liability of all other defendants who became holders of the Celebration Company's stock, other than the 8,000 shares of stock deposited with the American Trust and Savings Bank, except as to the defendants Upton, Rood, and Peavey. As to the estates of decedents the rule laid down in the 191st Ill. 356, is to be followed.

The decree in this case should be prepared with the assistance of a master and there should be a reference to the master to ascertain and report the liability of each defendant, individual and joint for the purposes of such decree, and that he report a decree in pursuance of the findings of this opinion, with leave to the master or any party in interest, if necessary, to have further directions.

NOTE.

A decree was thereafter entered in accordance with the opinion of Judge Tuley and an appeal was taken to the appellate court where the cause is still pending. The opinion of Judge Tuley is so thorough that the editors have deemed it advisable to publish the same.

For opinion of the appellate court on a former appeal see 55 Ill. App. 381.

Since the above decision has been put in proof the appellate court on January 7, 1907, affirmed the decision of Judge Tuley and adopted his opinion as the opinion of the appellate court.

(Circuit Court of Cook County. In Chancery.)

Charles H. Crawford, by his next friend

vs.

Hanna M. Crawford.

Hanna M. Crawford

vs.

Charles H. Crawford.

(May 2, 1899.)

ANNULMENT OF MARRIAGE ON GROUND THAT ONE OF THE CONTRACTING PARTIES IS UNDER THE AGE OF LEGAL CONSENT. In Illinois the age of legal consent to marriage is seventeen years in males and fourteen years in females. The complainant was married to the defendant while he was under the age of seventeen years and ceased to cohabit with her before he arrived at that age. Upon a bill filed by him to annul such marriage it was held that the marriage was voidable, and that inasmuch as complainant had not cohabited with defendant after he arrived at the age of consent, he was entitled to disaffirm the contract of marriage and have the same annulled.

Bill for annulment of marriage. Cross bill for separate maintenance. Circuit Court Gen. No. 178,361. Heard before Judge Richard W. Clifford.

Statement of facts.

The bill alleged that the complainant was a minor under the age of seventeen years. That on the 29th day of May, 1896, he was forced into a pretended marriage with one Hanna M. Swanson under threats of arrest on a charge of bastardy; that at the time of such pretended marriage he was but sixteen years of age and that he did not cohabit with said defendant after he arrived at the age of seventeen years. The defendant filed a cross bill for separate maintenance and proofs were taken upon the issues raised by such bill and cross bill. The court found the issues in favor of the complainant and entered the following decree:

“This cause having come on to be heard upon the bill of complaint and amendments thereto, the answer of the de-

fendant thereto, and the replication of the complainant to such answer, the cross bill of defendant, and answer to such, and upon evidence heard in open court, and the court, having heard the arguments of counsel, and being now fully advised in the premises, and on consideration thereof, doth find:

“That all the material facts alleged in said bill of complaint and amendments thereto are true.

“The court further finds from the evidence that Charles H. Crawford, complainant in the above entitled cause, was a minor under the age of seventeen at the time of the pretended marriage with the defendant, Hanna M. Crawford, on the 29th day of May, 1896, and he never lived and cohabited with said Hanna M. Crawford after he, the complainant, reached the age of seventeen; that the said marriage was null and void and of no force and effect.

“It is, therefore, ordered, adjudged and decreed by the court that the said marriage between the complainant and defendant be, and the same is hereby declared to have been and to be null and void and of no force and effect, and that the complainant be released from the obligations of said pretended marriage, and be restored to all and singular the rights and privileges of an unmarried man.

“It is further ordered, adjudged and decreed by the court that the cross-bill filed in the above cause be, and the same is hereby dismissed for want of equity.”

Carey W. Rhodes, solicitor for complainant. *Abraham Meyer*, of counsel.

Burras & Wilcoxon, and *Whitehead & Stoker*, solicitors for defendant and cross complainant.

CLIFFORD, J.:—

This is a case where the law is all one way and I am compelled to enter a decree for the complainant.

NOTE.

In Illinois the age of legal consent to marriage is seventeen years in males and fourteen years in females. 2 Starr & Curtis Rev. Stat., p. 2687, title “Marriage.” Where the plaintiff is under the age of legal consent at the time of marriage, such marriage may be

annulled upon the petition of the person under the age of consent. *Canale v. People*, 177 Ill. 219, 224; *McDeed v. McDeed*, 67 Ill. 545; *Shaffer v. State*, 20 Ohio, 1, 3; *People v. Slack*, 15 Mich. 192, 198; *People v. Bennet*, 39 Mich. 208; *Eliot v. Eliot*, 77 Wis. 634, 640, 641; *Holtz v. Dick*, 42 Ohio St. 23, 29; *McDowell v. Sapp*, 39 Ohio St. 558; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63, 67; *Koonce v. Wallace*, 7 Jones (N. C.) 194; *Smith v. Smith*, 11 S. E. 496, 498; *Stivers v. Wise*, 46 N. Y. S. 9; Reeves, Domestic Relations, p. 200; Coke, Littleton, p. 79; Swinebourne, Spousals, pp. 34, 36; Tyler, Infancy and Coverture, p. 126. An infant incapable for want of age to enter into a valid contract of marriage is incapable also to estop himself by a fraudulent declaration of his age. *Eliot v. Eliot*, 81 Wis. 295. Alimony and solicitor's fees *pendente lite* will not be allowed in an action to annul a marriage. *Meo v. Meo*, 2 N. Y. S. 569; *Stivers v. Wise*, 46 N. Y. S. 9. Separate maintenance cannot be had where there is not a valid marriage. *Crymble v. Crymble*, 50 Ill. App. 544.

EVIDENCE AS TO AGE OF MINOR. The testimony of the mother is the best evidence on the question of age. *Herman v. State*, 73 Wis. 248. But an infant may testify as to his own age. *Comm. v. Phillips*, 162 Mass. 504; *Hill v. Eldridge*, 126 Mass. 234; *Commonwealth v. Stevenson*, 142 Mass. 468; *Reed v. State*, 29 S. W. 1074; *Watson v. Brewster*, 1 Pa. St. 383; *State v. McClain*, 31 Pac. 790; *Stevenson v. Kaiser*, 29 N. Y. S. 1122; *Hogan v. Aid Ass'n*, 26 N. Y. S. 1081; *Cheever v. Corngdon*, 34 Mich. 296; *Morrison v. Emsley*, 53 Mich. 564.—Ed.

(Circuit Court of Cook County.)

People of the State of Illinois ex rel. Dennis McCutcheon

VS.

Mallory, Superintendent of the State Reformatory of Pontiac.

(December 22, 1904.)

1. INDICTMENT FOR ASSAULT WITH INTENT TO MURDER—PLEA OF GUILTY—SENTENCE FOR "BURGLARY, ETCETERA"—HABEAS CORPUS. The petitioner was indicted for an assault with intent to murder, and upon a plea of guilty was sentenced for the crime of "burglary, etcetera," to the Pontiac reformatory. Upon a petition for *habeas corpus*, held that this was a case where a party is indicted, pleads guilty to one crime and is sentenced by the court for another and a different and greater

crime, and that the court had no jurisdiction to enter such judgment, and that the prisoner must be discharged.

2. "BURGLARY, ETCETERA." There is no crime within the statute known as "burglary, etcetera."
3. SENTENCE FOR CRIME NOT UPON THE RECORD. Where a man is sentenced for a crime that does not appear upon the record, the jurisdiction of the court is lacking.
4. SENTENCE FOR CRIME TO REFORMATORY WHERE RECORD DOES NOT SHOW AGE OF PRISONER. The presumption of law is that the record being silent the prisoner was twenty-one years of age when he was sentenced to the reformatory. The relator was sentenced to the reformatory when there was nothing on the face of the record to show that his age was even inquired into, the law presuming him to be a man of twenty-one years of age when in fact he was eighteen. *Held*, that it is jurisdictional as to the right of the court to send the relator to the reformatory, and that this was a fatal objection to the right of the warden of the reformatory to hold the relator under such a mittimus.
5. AMENDMENT OF MITTIMUS TO SHOW AGE OF PRISONER. Relator was sentenced to the reformatory, the record not showing his age. Two years after he had been in the reformatory the relator was brought into court and the mittimus amended *nunc pro tunc* to show his age. *Held*, that it is going too far to hold that after a party had been in the penitentiary for two years he can be brought up and the judgment amended in his case by oral evidence, or that it can be corrected on account of an alleged misprision of the clerk after service of this kind, and *held* that when that amendment was made the court was without jurisdiction, more than two years having elapsed, the party having served a portion of his sentence, and the court having no power to go back and make that legal which was illegal during the two years he was serving.

Petition for a writ of habeas corpus. Gen. No. 258,124.
Heard before Judge Murray F. Tuley.

The facts are stated in the opinion.

W. G. Anderson, for petitioner.

TULEY, J.:—

In this case I dislike very much to interfere with the sentence of a prisoner under a penitentiary offense. The court ought to distinguish between error in the proceedings of the trial court and jurisdiction. It will scarcely be contended

that on an indictment for larceny, or a plea of guilty for larceny, a man might be found guilty of murder and sent to the penitentiary for life.

I recollect a case of Judge McAllister's discharging a party once who was tried by the court without a jury and sent to the penitentiary. He held that the court having no jurisdiction to try the party—there was a trial without a jury—that the judgment of the court to send him to the penitentiary was void.

In this case there was an indictment for an assault with intent to murder; the party plead guilty to it, the court proceeded to sentence him for the crime of burglary to the penitentiary. I do not know whether it was for the crime of burglary, or for the crime of "*etcetera*." (Reading). I do not know what that means, I do not know of any crime within the statute known as "*burglary, etcetera*."

It is a plain case where a party is indicted, plead guilty to one crime and is sentenced by the court to the Pontiac reformatory for another and a different and a greater crime. Now, has the court any such power? As I say, if he had been charged with larceny, the court might, if this had been sustained, have sentenced him for the crime of murder, sentenced him for life. I think the court had no jurisdiction to enter such judgment. It had jurisdiction to enter any judgment that was authorized by the crime for which he was charged, but not for another crime and another and different crime.

The court will take notice that the crime of burglary is punishable by a very much heavier punishment than the crime of assault with intent to murder. It may be a very great difference in the kind of service. I would like to know how at Pontiac, which they will determine,—whether they will determine to hold this man until he serves out the maximum punishment for assault and intent to murder, or are they going to hold him until he serves out the maximum punishment for the crime of burglary?

Counsel says it is for the Pontiac reformatory directors to determine which crime he is there for. I think that it is a pretty difficult thing for this court to determine, or any judge

to determine. I do not know that the directors of Pontiac have more wisdom than the judges have.

The language of the judgment is emphatic. He is sentenced for the crime of "burglary, *etcetera*," and they have no right to construe that to mean something else; because the assault with intent to commit murder is found in the *mittimus* and recites that he plead guilty to that charge, they have no right to say that the court shall not sentence him for the crime of burglary.

I do not know what may have possessed the judge there; he may have thought the crime of burglary came within the crime of assault with intent to commit murder,—assault with intent to commit murder while in the act of burglary. I do not know what might have influenced the judge to do that, we are outside, we can only go upon the *mittimus* itself and where they sentence a man for a crime that does not appear upon the record I think the jurisdiction of the court is lacking.

There is another thing in regard to this. Admit that that might be a *misprision* of the clerk,—I do not see how it can be held to be a *misprision* of the clerk. A *misprision* is a mistake, but you cannot say that it is a *misprision* of the clerk when the court definitely and specifically on its record charges a certain crime, that it is a mistake that the clerk writes it that way, *non constat*, that the man was sentenced for burglary, as the *mittimus* says.

I think too, it is jurisdictional as to the right of the court to send him to Pontiac. The age should appear upon the record anyhow; the age appears nowhere on the record submitted to this court, except that the court, two years after this man had been serving a sentence for the crime of burglary, has him brought back here and amends his record to show that he is eighteen years of age and he had been serving two years in Pontiac under the presumption that he was twenty-one years of age. Now, I know of no rule that will justify the court in holding that the criminal court had evidence before it of the age of this party, and they sent him to Pontiac because he was eighteen years of age; the presumption of law

is that the record being silent, he was twenty-one years when he was sent there, and in that respect the court had no jurisdiction to amend its judgment.

As stated, if it appeared to the court, his whole record being before the court, that there was anything upon the memorandum of the clerk or even on the judgment to show the age of this party, there might be a different question raised, but there is nothing in this record to show that the question of age was ever inquired into by the court. He is held there upon a *mittimus* that in my opinion is void on the face of the whole record, and he is indicted for one crime, pleads guilty and is sentenced for another and a greater crime. He is sent to Pontiac and when the law presumes that he is a man of twenty-one years of age, when in fact he is eighteen years of age, there is nothing on the face of the record to show that his age was ever inquired into. Both are fatal objections to the right of the warden to hold him under any such *mittimus*.

Now this *mittimus*,—two years afterwards the party is brought into court and this *mittimus*, which is a copy of the judgment, is amended, and it is amended *punc pro tunc* as of the day on which he has already served two years. Now, to hold that after a party has been in the penitentiary for two years you can bring him up and amend the judgment in his case by oral evidence, or that you can correct it on account of an alleged *misprision* of the clerk after service of this kind, I think is going too far.

The cases cited here hold that the judgment in a criminal case can be amended for a *misprision* of a clerk, accidental slip of the pen, and misreading of a sentence, misreading even of the offense for which the party was indicted, where it is apparent that there might have been misreading, as, for instance, in one case that was cited the party was indicted for rape, the clerk read it as an assault and intent to commit rape. That was a case where it might be held to be a misreading of the clerk, but no clerk could misread the crime of burglary for an assault with intent to kill.

When that amendment was made, the court was without

jurisdiction; more than two years had elapsed, the party had served a portion of his sentence and the court has no power to go back and make that legal which was illegal during the two years he was serving.

The petitioner will have to be discharged

(Superior Court of Cook County. In Chancery.)

New York Dental Parlors

vs.

Froon, et al.

(July 6, 1899.)

1. **TRADE-MARKS AND TRADE NAMES—DISTINCTION—RIGHT TO EXCLUSIVE USE OF TRADE NAME.**—"Trade-mark" and "trade name" are nearly synonymous. There is no exclusive right in a trade name unless such name has the distinguishing qualities of a trade-mark and is used to distinguish the goods, wares and merchandise of the user.
2. **TRADE NAME—INFRINGEMENT—NECESSITY OF.**—In the absence of fraud, deception or unfair competition, the user of a trade name cannot enjoin its use by others. (See note I—Ed.)
3. **TRADE-MARKS—GEOGRAPHICAL NAME.** A geographical name or term cannot be protected as an exclusive trade-mark. They must be supplemented by other words which import quality or standard.
4. **TRADE-MARKS—MISLEADING NAME.** Where complainants use a geographical name which is misleading, the court will not protect such name as a trade-mark. (See note II—Ed.)

Bill for injunction to restrain use of name similar to complainant's. Heard before Judge Jesse Holdom.

For statement of facts see opinion.

Howard Ames, for complainant.

James A. Fullenwider, for defendants, Froon and Simonds.

HOLDOM, J.:—

This bill is filed by the complainant, an Illinois corporation, against the defendants to enjoin them from using the name

of complainant or what is alleged to be its trade mark,—which is in fact its corporate name—its form of advertisement, or from using any name or design similar to its name or trade mark, so-called, etc.

Froon and Simonds only have answered, the remaining defendants, (George S. Gagnon, New York Painless Dentists' College, New York Painless Dental Company, Sophia Burton Gagnon), being names assumed by the answering defendants in their business as dentists.

It does not seem to me from the facts in evidence that this is a case warranting the interposition of this court by its writ of injunction. Counsel for complainant bases his claim for relief on the ground that defendants' conduct results in the infringement of complainant's trade name, and attempts to make a legal distinction between it and a trade mark. In this he somewhat fails. "Trade mark" and "trade name" are nearly synonymous, for the mark is the name, and its purpose is to protect the trade in the goods dealt in by the rightful possessor of either the mark or the name. It therefore follows that an infringement mostly arises from the giving out to the public or the trade of some article in the similitude of that protected by the mark or name which deceives and is a fraud not only upon the purchaser, but on the owner of the name or mark. It does not appear that the name of complainant is attached in any way to its wares, viz.: false or artificial as distinguished from genuine or natural teeth, or that it has in any particular way or manner acquired any fame or reputation personal to itself and not equally shared by others in the same line of business.

It nowhere appears that there is any deception working through the methods alleged to be practiced by the defendants which results in an injury to intending patrons of complainant by having their work done at the rival establishments of defendants; neither does it appear that complainant has any established trade built up by reason of any superior merit either of goods or mechanical skill different from that of others engaged in the same line of business.

This case is in no way similar to *Sanders v. Jacobs*, 20

Mo. App. 96, and neither the logic or reasoning of that case applies here. There the name "New York Dental Rooms" was registered under the act of congress as a trade mark, and entirely different rules and principles are applied for its regulation.

I cannot see that *Rubel v. Allegretti*, 76 Ill. App. 581,¹ lends any light by which to solve the questions raised in this case. There Allegretti gave his name to a particular kind of candy, which became popular to the feminine taste, and there was a large demand for it. Rubel, by fraud, deceived the public by palming off his candy for that of the Allegretti brand. This was a fraud alike upon the original manufacturers and the consumer, but in the case at bar naught is shown of any particular merit in complainant's goods, different from that of others, whereby any one patronizing defendants' establishments could in any way be defrauded, even should they be lured there by similarity of the name.

It is well settled legal doctrine that a geographical name or term cannot be protected as an exclusive trade mark. *Columbia Mill Company v. Alcorn*, 150 U. S. 460. They must be supplemented by other words which import at least quality or standard in some commercial article. Neither of the other words in the corporate name of complainant fulfill this essential requirement.

The advertisements in themselves do not constitute a fraud in any way, and certainly not such as will justify awarding an injunction to suppress.

The geographical name of the corporation complainant is misleading, and to that extent a legal fraud, as there is certainly nothing in connection with its business or its wares to make the name "New York" more descriptively applicable than that of Boston or Kankakee.

A case has not been made out entitling complainant to the injunction or other relief prayed, and as the bill is primarily one for an injunction, which is denied, the bill will therefore be dismissed for want of equity.

¹ Affirmed 179 Ill. 129.—Ed.

NOTE.

I.

INJUNCTION AGAINST THE USE OF CORPORATE NAMES. In *Newby v. Oregon Central Ry. Co.*, Deady, 609; S. C., Fed. Cas. No. 10,144, the court, in its opinion, said: "The corporate name of a corporation is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy deserves the same consideration and protection from a court of equity."

This language was entirely obiter, as a reading of the case demonstrates, yet it has been quoted approvingly in the later cases. See *Publishing Co. v. Dobinson*, 72 Fed. 603; Hopkins, Trade-marks (2d ed.) pp. 150, 151. There is, however, endless confusion upon this particular question. In general, courts of equity interfere to restrain infringement of names or trade-marks in two classes of cases: (1) To protect a technical trade-mark or trade name, and (2) to restrain unfair competition, as where one party simulates the marks, signs or labels of another. If, therefore, the corporate name constitutes a technical trade-mark, the court will award it protection irrespective of whether the action of the infringer is fraudulent or intentional or otherwise. Hopkins, Trade-marks (2d ed.) p. 44; *Vitascope Co. v. U. S. Phonograph Co.*, 83 Fed. 30. If, however, a corporate name is applied or used to designate particular goods, or is used in connection with the manufacture or sale of such goods, such name may be protected upon the principles applicable to trade-marks. In this class of cases may be ranged the oft cited cases of *Celluloid Mfg. Co. v. Cellonite Co.* 32 Fed. 94; *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462. Whether or not one corporation may restrain another corporation having the same or a similar name as the first corporation from using its name, where the name in question is not used in connection with the sale or manufacture of goods, presents a more difficult question. On the one hand, it has been held that the use of a corporate name similar to that used by another corporation cannot be enjoined if its adoption and use are in good faith and without fraudulent intent. *Saunders v. Sun Life Ass'n Co.*, 1 L. R. Ch. Div. (1894) 537; *Farmers' L. & T. Co. v. Farmers' L. & T. Co.*, 1 N. Y. S. 44; *Investor Pub. Co. v. Dobinson*, 82 Fed. 56; *Hygeia Water Ice Co. v. N. Y. Hygeia Ice Co.*, 140 N. Y. 94; *R. & B. Co. v. R. & M. Co.*, 8 N. Y. S. 52; *The Merchants' Banking Co. v. The Merchants' Joint Stock Bank*. 9 L. R. Ch. Div. 560; *Commercial Advertiser v. Haynes*, 49 N. Y. S. 938; *Borthwick v. Evening Post*, L. R. 37 Ch. Div. 449; *Nebraska Loan & Trust Co. v. Nine*, 43 N. W. 348; *Employers' Co. v. Insurance Co.*, 10 N. Y. S. 845; *Hygeia Water Co. v. Ice Co.*, 45 Atl. 957; *Continental Ins. Co. v. Fire Ass'n*, 101 Fed. 255; *L. & P. L. A. Society v. Assur-*

ance Co., 17 L. J. Ch. 37; *London Assurance v. L. & W. A. Corp. Lim.*, 32 L. J. Ch. 664; *Colonial Co. v. Home Ass'n Co.*, 33 Beav. 548; *Plant Seed Co. v. Michel Plant Seed Co.*, 37 Mo. App. 313. See also 7 Thompson, Corporations, p. 6,946; *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127.

In *Saunders v. Sun Life Assurance Co. of Canada*, 1 L. R. Ch. Div. (1894) 537, the defendants were incorporated in Canada under the name of "The Sun Life Assurance Company of Canada," and after carrying on business in Canada for over ten years they opened an office in London. "The Sun Life Assurance Society," which had carried on business in London for over eighty years, brought an action for an injunction to restrain the use of such name. It was held that, in the absence of fraud or dishonesty, the user by the defendant of its own corporate name without abbreviation, addition or other modification involved no misstatement of fact, and could not be restrained by injunction; but that the right of defendant did not extend to the use of the name of "The Sun" or "The Sun Life" without the addition of the words "of Canada."

In *Farmers' Loan & Trust Co. v. Same*, 1 N. Y. S. 44, plaintiff had transacted business in New York under the name of "Farmers' Loan & Trust Company" for over fifty years. Defendant was organized in Kansas in 1885 under the name of "Farmers' Loan & Trust Co. of Kansas." It established an office in New York, and advertised, omitting from its name the words "of Kansas." The court said that the name "Loan & Trust Co." was not an uncommon name as applied to monetary institutions, and that the prefix "Farmers" had been applied to designate similar companies engaged in business in different states (there being evidence that there were no less than seven "Farmers' Loan & Trust Companies" in the United States), and therefore the complainant's name was not such an arbitrary and exclusive designation as would entitle it *per se* to be protected from infringement. The court, however, granted a preliminary injunction restraining defendant from using its name in any other way than in connection with the words "of Kansas."

In *Investor Pub. Co. v. Dobinson*, 82 Fed. 56, it was held that the complainant corporation was not entitled to an injunction restraining another corporation from using the same corporate name, or from publishing a periodical having a name similar to the one published by complainant, where the defendant was incorporated and its paper published in a state distant from complainant and the names were used with distinguishing characteristics which rendered injury to complainant therefrom improbable, in the absence of proof that such injury has actually resulted.

In *Hygeia Water Ice Co. v. N. Y. Hygeia Ice Co.*, 140 N. Y. 94, the plaintiff sought to restrain the defendant from using its corporate name. The plaintiff was incorporated with a capital of \$5,000 one

month previous to the defendant, which was capitalized at \$300,000. It appeared that the defendant had no knowledge of the existence of the plaintiffs, and also that the word "Hygeia" was in use previous to the incorporation of the plaintiffs as part of the corporate name of a water company. The injunction was refused.

In *Richardson & Boynton Co. v. Richardson & Morgan Co.*, 8 N. Y. S. 52, it was held that the defendant corporation would not be restrained from using the name of the Richardson & Morgan Company on account of confusion arising from its similarity to the name of the plaintiff, the Richardson & Boynton Company, where there is no further evidence of confusion than the fact that correspondence addressed to plaintiff was delivered to defendant, and that in one instance credits were wrongfully posted, and that according to the testimony of a single salesman of plaintiff mistakes occur daily as to plaintiff's locality. The court further said that confusion in addresses was not equivalent to confusion in names.

In *Merchants' Banking Co. v. Merchants' Joint Stock Bank*, 9 Ch. Div. 560, a banking company established in 1879, having offices in Bloomsbury, and intended to deal chiefly with tradesmen in that district, was registered with a name similar to that of a banking company established in 1863, having offices in the city, and dealing principally with wholesale merchants. Held, that since there was no *mala fides* on the part of the new company in adopting the name they had taken, nor a probability of their appropriating the plaintiff's business, the old company was not entitled to an injunction restraining the defendant from using its corporate name.

A. A corporation will not be enjoined from using its corporate name because of the fact that it is customary in the trade to refer to it by an abbreviated title, which results in confusing its name with that of another corporation. In this case it was held that the United States Trust Company of New York could not restrain the use of the name "United States Mortgage & Trust Company," even though the company was commonly referred to as "The United States Trust Co." *In re United States Mortgage Co.*, 32 N. Y. S. 11, and cases cited.

B. A corporation using its corporate name is exercising a franchise conferred by law. *Boston Rubber Co. v. Same*, 149 Mass. 437; *American Order of S. C. v. Merrill*, 151 Mass. 558; 1 Thompson, Corporations, p. 199.

C. Every man has the absolute right to use his own name in his own business, provided he does not resort to artifice or contrivance for the purpose of producing the impression that his goods are those of another. *Meneely v. Meneely*, 62 N. Y. 427, and cases cited. And this rule should apply with equal force to corporations. *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127; *Celluloid Mfg. Co. v. Cellonite Co.*, 32 Fed. 94.

D. On the other hand, it has been held that a court of equity will protect a corporation in the use of its name upon the principle applicable to trade-marks. *American Clay Mfg. Co. v. Same*, 198 Pa. 189; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94; *State v. McGrath*, 92 Mo. 355; *Newby v. Railroad Co.*, Fed. Cas. No. 10,144, S. C., Deady, 609; *Rogers v. Rogers*, 11 Fed. 495; *Investor Pub. Co. v. Dobinson*, 72 Fed. 603; *Ex parte Walker*, 1 Tenn. Ch. 97; *American Grocer v. Grocer*, 25 Hun, 398; 1 Thompson, Corporations, secs. 296-299; 7 Thompson, Corporations, sec. 8192; *Higgins v. Higgins*, 144 N. Y. 462; *Brewery Co. v. Same*, App. Cas. (1899) 83; *Roy v. Roy*, 58 N. Y. S. 979; *Brooklyn White Lead Co. v. Masury Co.*, Cox, Trade-mark Cases, 210, 25 Barb. 416; *Philadelphia Trust Co. v. Same*, 123 Fed. 534; *Holmes v. Holmes*, 37 Conn. 278. And see full list of cases cited in brief of counsel in *International Trust Co. v. International Loan & Trust Co.*, 10 L. R. A. 758. In a number of the above cases there was evidence of unfair competition.

But to warrant such relief, the necessary facts must be established by very satisfactory proof. When the conduct complained of is that merely of a fair competitor in the same line of business, and the name assumed is not likely to mislead ordinary purchasers, a court of equity will not interfere. *Plant Seed Co. v. Michel Plant Seed Co.*, 37 Mo. App. 313.

In *Block v. Standard D. & D. Co.* (C. C. S. D. Ohio, W. D.) 95 Fed. 978, it was held on demurrer that a bill which alleged that complainant and defendant were competitors in the same line of business; that defendant had assumed a corporate name similar to complainant's trade name, and the public had been deceived thereby, and great confusion and injury had resulted to complainant's business therefrom; that defendant's incorporators, before it was organized, knew of the existence and character of complainant's business and the trade name under which it had for a number of years been conducted, and that defendants had refused, on complainant's request, to desist from the use of the name, states a cause of action against defendant for unfair competition. The above case was thereafter submitted on final hearing and is still under advisement by Judge Thompson.

THE ILLINOIS RULE. The courts of Illinois have several times had the question under discussion.

In *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127, the butter company filed a bill to restrain the creamery company from using its name. Both concerns were engaged in the same business. The court held that there was not sufficient similarity between the two names to deceive purchasers, and that even if the names of the two corporations were somewhat similar, yet, in the absence of any intent, act or artifice to mislead dealers in the market or the public

at large as to the identity of the two corporations, each had the equal right to use its own name in its own business.

In *Chicago Landlord's Protective Bureau v. Koebel*, 112 Ill. App. 21, the plaintiff corporation sued to restrain the defendant from using a name similar to the plaintiff's corporate name. The court held that the imitation of a corporate name by others in a like business, in a manner calculated to deceive the public, will be restrained by injunction. It was also held that it was immaterial that the intention of the defendant in adopting the imitation name was not fraudulent or wrongful, and that it was no defense that at the time of the adoption of such name the defendant was ignorant of the plaintiff's existence. Reliance was placed on *Newby v. Railroad Co.*, Deady, 609, *supra*. The decision of the court is based upon the principle of the trade-mark cases, and irrespective of the principles of unfair trade. The decision of the appellate court was affirmed in 210 Ill. 176.

In the recent case of *People ex rel. v. Rose*, 219 Ill. 46, it was held that the United States Express Co. had the right to enjoin the use of its name as a trade name by other parties, whose intention is to deceive the public and thereby to fraudulently obtain business intended for the former company. An attempt was made to compel the issuance of a charter in the name of United States Express Co., but unsuccessfully. See also *Allegretti v. Chocolate Cream Co.*, 177 Ill. 129; *Hazelton Co. v. Tripod Co.*, 142 Ill. 494; *Int. Comm. v. Y. W. C. A.*, 194 Ill. 194; Hopkins, Trade-marks (2d ed.) p. 150.

In this connection it may be noted that the Act of May 16, 1905 (Sess. L. of Ill. 1905, p. 130), in reference to the organization of corporations, provides that "no license shall be issued to two companies having the same or a similar name, nor shall any foreign corporation having the same or a similar name as any domestic corporation be admitted to this state under any foreign corporation law."

Although the question is not entirely free from doubt, the rule in Illinois probably is that the mere identity of names, with proof that their use leads or tends to lead to confusion in the minds of the purchasing public is sufficient to obtain relief. The case of *Koebel v. Landlords' Protective Bureau*, *supra*, goes a long way toward establishing that proposition. True, in that case, although the evidence was conflicting, there was some evidence of a fraudulent purpose, and the language of the court should perhaps be read in that connection. If the two companies are engaged in an entirely different business, there can be no attempt to sell the goods of one company as the goods of the other, and therefore no relief could be had. But if the business of the two corporations is the same, and the identity of names results in confusion and induces

the public to believe that the business of the one company is the same as the other, if there is some evidence of fraud, either actual or constructive, relief should and probably would be granted.

In some cases the mere adoption of the name of another corporation by a corporation engaged in the same line of business would be sufficient to obtain relief, as, for instance, if the name of the former corporation was well and favorably known to the public at large. Such a case is *Philadelphia Trust Co. v. Same*, 123 Fed. 534.

II.

THERE CAN BE NO VALID TRADE-MARK IN A NAME WHICH DECEIVES THE PUBLIC, OR WHICH FALSELY STATES THAT THE GOODS ARE MADE OR PRODUCED IN A PARTICULAR PLACE. The leading case is *Manhattan Medicine Co. v. Wood*, 108 U. S. 218. There Moses Atwood originated and made, at Georgetown, Mass., a proprietary medicine called "Atwood's Vegetable Physical Jaundice Bitters," and complainant, by assignments, acquired the formula and right to the name, and made the article at New York after Atwood's death, using bottles and labels of the same style containing the words, "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass." and made by "Moses Atwood, Georgetown, Mass." On suit for an injunction against the infringer the relief was refused, on account of the misrepresentations. The court relied on *The Leather Cloth Company (Limited) v. The American Leather Cloth Company (Limited)*, 4 De G., J. & S. 137, 11 H. L. Cas. 523.

In *Palmer v. Harris*, 60 Pa. St. 156, protection was sought against an exact counterpart of a trade-mark in the words "Golden Crown" for cigars. Relief was denied for the reason that the label falsely represented that the goods were manufactured in Havana, when in fact they were made in New York.

In *Bolander v. Peterson*, 35 Ill. App. 551; S. C., 136 Ill. 215, protection was denied to the name "Svenska Snus Magasinet," meaning "Swedish Snuff Magazine," for the reason that the goods were actually made in Chicago.

In *American Cereal Co. v. Eli Pettijohn Co.*, 72 Fed. 903 (affirmed, 76 Fed. 372), the complainant, as purchaser and assignee of the business, sought an injunction to restrain an infringement, after it had ceased to manufacture the article at the original mill. The injunction was denied.

In *Coleman v. Dannenberg Co.* (Ga.) 30 S. E. 639, the complainant sought to protect the words "Old Colony Shoe Company, Rockland, Mass.," used upon shoes sold by complainant, but made in Boston, Mass., by the Commonwealth Shoe & Leather Company. The injunction was denied, although the reproduction was exact. To the same effect see:

Newman v. Pinto, 57 L. T. (N. S.) 31, 4 R. P. C. 508; *Wrisley Co. v. Iowa Soap Co.*, 104 Fed. 548; *Hobbs v. Francais*, 19 How. Pr. 567, R. Cox, 287, 290; *Krauss v. Peebles* 58 Fed. 585, 595; *Prince Co. v. Prince Co.*, 135 N. Y. 24, 31 N. E. 990; *Stachelberg v. Ponce*, 23 Fed. 430; *Partridge v. Menck*, 1 How. App. Cas. 547; *Parlett v. Guggenheimer*, 10 Atl. 81, 67 Md. 542; *Royal Baking Powder Co. v. Raymond*, 70 Fed. 376; *Connell v. Reed*, 128 Mass. 477; *Joseph v. Macowsky*, 96 Cal. 518, 31 Pac. 914; *Kenny v. Gillet*, 70 Md. 574, 17 Atl. 499; *Heyde v. Wittkowsky*, 5 N. S. Wales, L. R. (E) 75; *Labott v. Trester*, 7 Rev. Legale, 386, 2 St. Dig. 725; *Candee v. Deere* 54 Ill. 439; *Siegert v. Abbott*, 61 Md. 276, 48 Am. Rep. 401; *Pepper v. Labrot*, 8 Fed. 29, 39; *Millbrae Co. v. Taylor* (Cal.) 37 Pac. 235; *Pillsbury Co. v. Eagle*, 86 Fed. 608; *Wilson v. Needermann*, 19 Week. L. B. 268; *Hilson v. Foster*, 80 Fed. 896; *Wood v. Lambert*, 32 Ch. Div. 247; *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 26 Pac. 556; *California Fig Syrup Co. v. Stearns*, 67 Fed. 1008, 73 Fed. 812; *Ginter v. Kinney*, 12 Fed. 782; *Laird v. Wilder*, 9 Bush. 131, 15 Am. Rep. 707; *Wood v. Lambert*, L. R. 32 Ch. Div. 247, 3 R. P. C. 81; *Wolfe v. Burke*, 56 N. Y. 115. But see *The Fair v. Morales*, 82 Ill. App. 499.

A. There can be no property in a name as a trade name where the name is a misrepresentation or is calculated to deceive, as where a copartnership uses a name which imports that it is a corporation. *McNair v. Cleave*, 31 Leg. Int. 212, 10 Phila. 155; *Clarke v. Aetna Iron Works*, 44 Ill. App. 510; Brown, Trade-marks, p. 502; Price & Stewart, Trade-mark Cases, p. 6; *Seabury v. Grosvenor*, 14 Blatchf. 262; *Cotton v. Gillard*, 44 L. J. Ch. 90; *Bradley Fertilizer Co. v. South Pub. Co.*, 23 N. Y. S. 675; *Hazelton v. Hazelton*, 30 N. E. 339; *Koehler v. Sanders*, 25 N. E. 235; *Crossley v. Dunn*, 15 L. R. App. Cas. 252; *Kohler v. Beeshore*, 59 Fed. 572.

B. THE EXTENT OF THE DECEPTION. The presence of the word "Copyrighted" on a label, when in fact it had not been copyrighted, is not such a misrepresentation as would prevent the owner receiving protection against a pirate. *Solis Cigar Co. v. Pozo* (Colo.) 26 Pac. 556.

Fraud, such as to disentitle a plaintiff to relief against unfair competition in his business, cannot be predicated on statements which, owing to the brevity required by the limited space of a label, are not minutely accurate. *Clark Thread Co. v. Armitage*, 67 Fed. 896.

Where the words in a label adopted as a trade-mark are substantially true and contain nothing calculated to deceive the public, that they are not literally true will not deprive the merchant of the protection of the law. *Conrad v. Brewing Company*, 8 Mo. App. 278.

Statements contained in labels, which are not entirely accurate,

but are entirely immaterial, are not such false representations as will disentitle a manufacturer to restrain an infringement. *Tarrant v. Hoff*, 22 C. C. A. 644; *S. C.*, 76 Fed. 959.

Courts of equity will not protect trade-marks which deceive the public; but that deception need not be of such a character as to work a positive injury to purchasers, nor, on the other hand, will the mere fact that some wrong impression may be received by the public be sufficient to destroy the validity of the trade-mark. If the representation of the trade-mark does not in fact mislead the public, and may be understood in any reasonable sense as substantially true, the trade-mark will be entitled to protection. *Meriden Britannia Co. v. Parker*, 39 Conn. 450.

If a trade-mark, or the label bearing it, untruly and fraudulently represents an article as protected by a patent, it is *prima facie* the misrepresentation of an important fact and the owner of the trade-mark is generally for that cause disentitled to equitable relief against a pirate. Brown, Trade-marks, sec. 72; Cox Manual of Trade-mark Cases, Nos. 116, 142, 223, 267, 288, 304, 342, 384, 444 and 528; *N. Y. Con. Card Co. v. U. P. C. Co.*, 39 Hun, 611; *Cheavin v. Walker*, L. R. 5 Ch. Div. 850; *Nixey v. Roffey*, W. N. (1870) 227.

A fraudulent intention or a tendency to mislead is essential. The untrue use of the word "patent," or an equivalent expression, does not necessarily disentitle to relief. If a fraudulent intention does not exist, and the use of the word may be explained in any reasonable sense consistent with truth and honesty, the plaintiff will not be prejudiced. Brown, Trade-marks, p. 88; *Oil Tank Co. v. Scott*, 33 La. Ann. 946.

If the patent has expired and the plaintiff continues the use of the word "patent," he is not prevented from restraining defendants from so doing. *Edelstein v. Vick*, R. Cox, 119.

One who has fraudulently imitated the trade-mark of another and offered for sale his own goods as those of the owner of the trade-mark cannot be heard to raise the objection that the latter's goods are injurious to health. *Curtis v. Bryan*, 2 Daly (N. Y.) 312.

An injunction *pendente lite* will be refused where plaintiffs mislead the public by falsely claiming that the form of their cakes of soap on which the label was used and the title in the label were secured by a trade-mark. *Brown v. Doscher*, 20 N. Y. S. 900.—Ed.

(Superior Court of Cook County.)

Silverstein, for use of Brewer and Company

vs.

Fred Gresheimer.

(1900.)

1. **ASSIGNMENT OF CHOSSES IN ACTION AT COMMON LAW.** At common law a chose in action, unless a negotiable instrument, was not assignable, unless the debtor assented to the assignment and promised to pay the assignee.
2. **SAME—MODERN RULE.** Under the modern authorities the general test as to whether a chose in action is assignable is whether or not it would survive and pass to the personal representatives of a decedent assignor if no assignment had been made. If it would so survive, it may be assigned so as to pass the interest assigned to the assignee; if it does not so survive, it is not assignable either at law or in equity.
3. **UNEARNED WAGES—VALIDITY OF ASSIGNMENT OF.** Although the authorities are conflicting as to whether or not unearned wages may be assigned so as to be recoverable in an action at law, the better doctrine is that except as to wages actually due at the time of the assignment, such an assignment is an attempt to transfer a mere possibility of future earnings, and therefore as to such future earnings is not an existing chose in action.

Judgment for plaintiff, motion for new trial granted.
Heard before Judge Jesse Holdom.

For statement of facts see opinion.

Geo. Webster and *G. E. Burley*, for plaintiff.

B. M. Shaffner for defendant.

HOLDOM, J.:—

This is an action originally instituted before a justice of the peace upon an assignment by one Silverstein of his weekly wages of twenty-five (\$25) dollars to Brewer & Company, said wages to be thereafter earned from the defendant Gresheimer, in whose employment he was under a verbal contract from week to week, the consideration for such assignment being a loan from Brewer & Company to Silverstein of one hundred

and thirty-five (\$135) dollars. The cause comes to this court on appeal.

A trial before the court and a jury resulted in a verdict for the plaintiff, and the case is now before the court on a motion for a new trial made by the defendant.

The evidence tends to show that Brewer & Company served defendant with a copy of the contract of assignment, but that defendant refused to accept the same, or to acknowledge that it had any binding effect upon him. Neither at the time of the making or delivery of the assignment by Silverstein to Brewer & Company was there any wages due Silverstein from Gresheimer, but on the contrary it is claimed and not disputed, that Silverstein was then overpaid in the sum of seventy-one (\$71) dollars. Gresheimer ignored the assignment and Silverstein continuing in his employment, he paid him his wages regularly.

At common law a *chose* in action, except negotiable instruments, was not assignable, unless the debtor assented to the assignment and promised to pay the assignee, in which case an action might be maintained by the assignee on the express promise of the debtor to pay. 2 Black Com., 442; 2 Chitty on Contracts, 1357 (11th Am. Ed.); *McKinney v. Alvis*, 14 Ill. 33; *Olds v. Cummings*, 31 Ill. 188.

This rule of law has in these modern times, conforming to changed conditions, been much modified, so that the common law rule in its entirety now no longer prevails.

The general test to be applied in determining the assignability of a *chose* in action is whether or not it would survive and pass to the personal representatives of a decedent assignor if no assignment had been made. If it would so survive it may be assigned so as to pass the interest assigned to the assignee; if it does not so survive, it is not assignable either at law or in equity.

See cases, note 4, on page 1017 Am. & Eng. Ency. Law, second edition.

Applying this test to the assignment in the case at bar it is clear that it was not effective or binding upon the defendant.

The authorities as to whether or not unearned wages may be

assigned so as to be recoverable in an action at law in a jurisdiction where the distinction between law and equity prevails are conflicting. I am, however, inclined to hold to what I consider the better doctrine enunciated in the case of *Lightbody v. Smith*, 125 Mass. 51, that except as to wages actually due at the time of an assignment, such an assignment is an attempt to transfer a mere possibility of future earnings and therefore as to such future earnings is not an existing *chose in action*.

Justice Cooley in *Kane v. Clough*, 36 Mich. 436, held to the doctrine announced in *Lightbody v. Smith*, and inferentially decided that where an action could not be maintained on an assignment of demands having no actual existence at the time of the assignment, resort might be had to equity after the demands intended were subsequently brought into existence. This rule of law would be fatal to a recovery in this cause on the law side of the court, where we find it.

The verdict will therefore be set aside and a new trial granted.

NOTE.

In *Mallin v. Wenham*, 209 Ill. 252, affirming 103 Ill. App. 609, it was held that an assignment of wages to be earned under a subsisting employment is valid and enforceable, if made in good faith and for a valuable consideration, even though the employment is for an indefinite time.—Ed.

(Criminal Court of Cook County.)

City of Chicago

vs.

A. M. Forbes Cartage Company.

City of Chicago

vs.

R. J. Mix Transfer Company.

(February 11, 1901.)

1. COMMON CARRIERS—TEAMING COMPANIES ARE NOT. Persons carrying on a general contract teaming business, and owning horses and wagons suitable for the hauling of goods in and about the

city of Chicago, who do such hauling for their customers under time contracts at a fixed price per ton, are not common carriers, and cannot be compelled to carry goods against their will.

2. **SAME—POWER OF CITY TO CONTROL AND LICENSE.** As the business of such teaming companies is not affected with a public interest, it is not subject to police control.

3. **PUBLIC CART—DEFINED.** A teaming company which carries goods within a city for certain customers under private contract at a fixed price per ton, and does not hold itself out as undertaking for hire to transport the goods of any person applying to them, is not a common carrier, and does not come within the meaning of a city ordinance regulating and licensing "public carts."

Appeal from police magistrate. Heard before Judge Jesse Holdom.

Statement of facts by court.

The defendants were fined by a police magistrate, for violation of section 521 of the Revised Code of Chicago (1897), article 3, and from the judgments of the police magistrate, the defendants each prosecuted an appeal to the criminal court of Cook county.

The material sections of the ordinance in question are as follows:

"507. Public Cart, Defined.—Every cart, truck, wagon, dray or other vehicle drawn by one or more horses or other animals, which shall be kept, used, driven or employed for the transportation or conveyance of goods, wares, merchandise, or other articles, from place to place, within the city of Chicago, for hire, wages, or pay for such transportation, shall be deemed a "public cart" within the meaning of this article, and every person who shall set up, or so keep, use or employ any such public cart, without first obtaining license therefor from the mayor of said city as is hereinafter provided shall be deemed guilty of a violation of this article.

508. License.—The mayor shall from time to time, license and appoint so many and such persons, companies, or corporations, as he may think proper to set up and keep public carts in said city, and he may revoke or suspend any or all such licenses at his pleasure. All persons licensed as afore-

said to keep public carts, shall be deemed to be public cartmen within the meaning of this article; but it shall not be lawful for any person to receive or hold a license to keep public carts or to be a public cartman, unless he be a resident of the state of Illinois, and is the actual owner of the cart or carts so licensed to be kept as public carts; and the mayor may examine under oath, all persons applying for or holding any such license, touching their qualifications as aforesaid; and all licenses other than to persons so qualified shall be void.

509. License Fees.—The city collector shall require and receive for the use of the city from every person to whom the mayor may grant a license:

1. For all baggage, express and furniture wagons and vehicles drawn by two or more horses or other animals, shall be charged for license, each, the sum of five dollars per annum.

2. For all baggage, express and furniture wagons and vehicles drawn by one horse or other animal, shall be charged for license, each, the sum of two dollars and fifty cents per annum.

3. For all drays, carts, wagons and other vehicles running within said city for hire or reward, and not otherwise expressly provided for, shall be charged for license, each, the sum of two dollars and fifty cents per annum.

4. For all wagons and other vehicles drawn by four or more horses or other animals, for the conveyance of any heavy article or thing for hire, from place to place in said city, shall be charged for license, each, the sum of five dollars per annum: Provided, that nothing herein contained shall include omnibuses and baggage wagons running to and from hotels free of charge.

521. License Number Displayed.—All public cartmen upon taking out a license, shall obtain from the city clerk two painted metal plates eight inches long and four inches wide, on which shall be stamped the number corresponding to the license, and also the words, "Chicago express," together with the year for which the license is issued, which plates the said licensed cartmen shall cause to be securely fastened on the outside of each side of the box of his cart, so licensed, or in a conspicuous place, so that the same can be easily seen. The

said licensed cartmen shall also at the same time obtain from the city clerk a metal badge one and three-fourths inches long and one and one-eighths inches wide, having a number thereon corresponding to the number on the aforesaid plates; said badge shall be provided with a pin or other fastening, and shall be worn by such licensed cartman in a conspicuous place on the outside of the coat, so that it may not be hidden either by accident or design. Upon the expiration of the licenses the city clerk shall prepare new plates, similar in design, but of a different color, and with the proper year stamped thereon, and shall also prepare new badges for all applicants for license as cartmen. The driving or using of a public cart without the above described plates attached thereto in plain sight, and without the driver thereof having such badge, shall be deemed a violation of this article."

Collins & Fletcher, for defendants.

James Donohue, assistant prosecuting attorney for the city of Chicago.

HOLDOM, J.:—

The defendants are charged with a violation of chapter 19, article 3, Revised Code of Chicago, in operating a public cart without displaying a plate and badge, as provided in section 521 of said code.

The defendants are both incorporated under the laws of this state, and are engaged in contract teaming—that is—they own horses and large and small trucks and wagons, suitable for the handling of various kinds of goods and merchandise in and about the city of Chicago. They each maintain a business office as well as stables for the keeping of their horses and housing their vehicles; all of the business of hauling is done by time contracts at a fixed price per ton with, among others, such firms as Sprague, Warner & Co., Hibbard, Spencer, Bartlett & Co. and S. A. Maxwell & Co. Such teams and vehicles with drivers are sent out to such firms, and are entirely under their direction, and haul their goods to the freight houses, warehouses and other places as instructed, returning direct, either to the stables or to the company's office

for instructions. Many of the vehicles are lettered with the names and business of the firms for whom hauling is done, although as a matter of fact, none of such firms have any proprietary interest, either in the vehicles or the horses drawing them. None of the vehicles have any stand or solicit trade on the streets, nor odd jobs of hauling are either solicited or taken, and no driver or other employe takes any order for hauling except at the office.

These are substantially the facts proven, germane to this inquiry.

It is conceded that the metal plates and badges directed by the ordinance to be fixed on public carts and worn by their drivers were not so done to either the drivers or wagons, the subject-matter of the contention in these prosecutions.

Two defenses are interposed:

1st. The ordinance is illegal and void, and

2nd. If valid, defendants are not amenable to it.

In the view I take of the case, it is unnecessary to decide at this time, as to whether or not (in a proper case) the ordinance is valid.

Section 507 defines all vehicles coming within its scope as "public carts."

Section 512 sets apart certain territory in the city "as a public stand for trucks, wagons and teams."

Section 513 makes it the duty of the superintendent of police to "assign to the owner of each duly licensed public cart a stand where such cart may remain, waiting to be employed, and also a stand where it may remain at other times."

Section 515 provides that "it shall be the duty of every person driving or having charge of a public cart to give to any person requesting it, his name and place of residence, the number of the cart he is driving or in charge of, and the name and place of residence of the owner thereof, and a refusal to do so shall be deemed a violation of this article. * * *"

Section 519 fixes a scale of charges and the manner of loading and unloading.

Section 525 makes it obligatory upon the driver of any public cart to haul goods when requested, at the rates of compen-

(Circuit Court of Cook County. In Chancery.)

Northwestern Elevated Railroad Company

vs.

City of Chicago, et al.

(Feb. 8, 1904.)

1. **ELEVATED RAILROADS—RIGHT TO OCCUPY STREETS.** The right to exist as an elevated railroad was derived by complainant from the state, but the right to occupy any of the streets of the city of Chicago by elevated railroad structures and the extent of such occupation is derived exclusively from the city by virtue of the ordinances granting the rights.
2. **ELEVATED RAILROADS—JOINT USE—RIGHT TO EXTEND PLATFORMS.** A provision in the ordinances that the tracks authorized to be laid should be subject to the joint use of other named elevated railroads gives to such elevated railroads no power as to the extension of platforms which is not conferred upon the railroad whose track they use.
3. **STREETS—CONTROL OF BY CITIES.** It has always been the policy of the state of Illinois that the municipalities should have the control of the streets within their limits. As regards the title of the streets, the fee is vested in the city, but it owns and controls the streets as trustee only.
4. **ORDINANCES GRANTING RIGHTS IN STREETS—RULE OF CONSTRUCTION.** The same rule of construction that would be applied to an act of the general assembly of the state granting the right of a railroad to occupy public highways should be applied to an ordinance of the city of Chicago granting rights and privileges in regard to the occupation of the street by a railroad company.
5. **ORDINANCES GRANTING USE OF STREETS—FORCE AND EFFECT OF.** An ordinance granting rights and privileges in regard to the occupation of the streets by a railroad company has all the force and effect of a statute law as to the right of the railroad company to use the street and as to the manner in which it shall occupy the same.
6. **ORDINANCE—LEGISLATIVE INTENT—ASCERTAINMENT OF.** The legislative intent is to be ascertained, in the first place, from the terms of the ordinance, and in the second place, by the application of such terms to the subject matter.
7. **ORDINANCES—AMBIGUITY—PRACTICAL CONSTRUCTION BY EXECUTIVE OFFICERS.** Where there is an ambiguity in a law or ordinance, practical construction given the same by executive officers charged with its execution should be considered, and when

the acts are repeated, and for a considerable length of time, they may have great and even controlling weight, and under certain circumstances, may be conclusive by way of equitable estoppel.

8. **ORDINANCES—PRACTICAL CONSTRUCTION OF BY EXECUTIVE OFFICERS MUST BE OF SAME ORDINANCE.** The practical construction of executive officers must rise from acts done under the law or ordinance to be construed, and not under other ordinances or laws.
9. **ORDINANCES—WHEN CITY BOUND BY PRACTICAL CONSTRUCTION OF.** There could be no practical construction and no acquiescence which would bind the city without knowledge, either actual or presumed, of the city council of such acts of practical construction of ordinances by executive officers of the city.
10. **JUDICIAL CONSTRUCTION—ANALOGIES.** Analogies are dangerous in judicial construction.
11. **ELEVATED RAILROAD; EXTENT OF RIGHT OF WAY IN PUBLIC STREET.** An elevated railroad's right of way in the street is confined to so much of the street as is actually occupied by it, and to extend its structure in a public street is an extension of its right of way.
12. **PRIVILEGES AND FRANCHISES—CONSTRUCTION OF GRANTS OF.** Grants of special rights and privileges in a public street should be strictly construed in favor of the public and against the grantee of the privilege.
13. **STREETS—ENCROACHMENTS ON—RIGHT OF PUBLIC TO LIGHT AND AIR.** The public have the right to insist that light and air shall penetrate every part of a street, not only to the surface but above the surface, and every encroachment upon such street, whether upon the surface or above the surface or below the surface, between such lot lines, is against the common right to the public, that the same shall be kept free and unobstructed.
14. **ELEVATED RAILROADS—USE OF STREETS EXCLUSIVE.** The use and occupation of the street by an elevated railroad is not in common with the public, but is exclusive. The part of the street above the surface which it occupies is in its exclusive use and that part of the street which is necessary to support the structure is also in its exclusive occupation and for the benefit of the elevated road.
15. **ELEVATED RAILROADS—ORDINANCE GRANTING POWERS TO, CONSTRUED MORE STRICTLY THAN ORDINANCE GRANTING POWER TO SURFACE RAILROAD.** The construction of an ordinance as to powers granted an elevated railroad must be construed not only more strictly than one granting powers to a surface street railroad, but it must be held that different principles apply in making such construction.

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16. **PUBLIC USE.** By the "*public*" or "*public use*" is meant the people of the whole state.
17. **STREETS—CITY HOLDS TITLE AS TRUSTEE.** The city holds the fee and the control of the streets as a trustee for the public, and in its control of the streets its ownership is subordinate to its duties as a trustee. It is not a trustee for the inhabitants of the city, but a trustee holding and controlling the streets for the public use.
18. **CITIES—POWER TO SELL FRANCHISES IN PUBLIC STREETS.** The court is inclined to the opinion that the city is without power (even by the joint action of the mayor and aldermen) to sell or barter away any franchise in the public streets for a compensation to be paid into the city treasury. The city as a public trustee of the streets is subject to the rule applying to all trustees, whether individuals or corporations, and that is that a trustee cannot control trust property for his or its own benefit. The city has power to exact a reasonable license fee for compensation for the extra cost it may be put to and the supervision and the use of its police made necessary by such use of its streets, but it cannot speculate or make money for its treasury, or its taxpayers, out of its exercise of the power to control the public streets as a trustee for the public.
19. **CITIES—ESTOPPEL—ULTRA VIRES CONTRACTS.** No estoppel can be placed upon the city for its action under an *ultra vires* contract.
20. Complainant, claiming to have succeeded to all the rights of the different elevated railroad companies whose lines jointly made up the so-called "Union Loop" in the city of Chicago, on the 27th day of May, 1903, obtained a permit from the commissioner of public works for the extension of the platforms of the elevated structure at the different stations on three sides of the Union Loop built upon certain streets, in accordance with a plan showing such platform extensions. After a considerable amount had been spent in extending the platforms and before the completion of the work the commissioner of public works revoked the permit and ordered the work to cease. The complainant thereupon filed a bill for an injunction praying that the order of the commissioner revoking the permit and ordering the work on the platforms to cease be declared void and of no effect and that the city of Chicago and the commissioner of public works be perpetually enjoined from interfering with complainant in the work of extending and altering the platforms of its stations. Complainant claimed that it had the right to extend the platforms of its various stations located on certain streets, under certain ordinances of the city of Chicago giving it the power to

construct and maintain over and upon certain streets "all necessary or proper stations, platforms and depot stations," etc., and also providing that "the permission and authority to locate, construct and maintain all such requisite platforms, being herein expressly granted said company whenever and wherever such methods of reaching said stations may be found necessary."

Held:

(1) That the power to *construct* platforms did not confer the power to *extend* platforms.

(2) That the ordinance as to powers conferred on elevated railroad companies must be most strongly construed against the donee and in favor of the public, and not extended by implication.

(3) That it was not the intention of the city council to grant to the elevated roads by the ordinances the right to make extension of their platforms.

(4) That the power to construct and maintain *requisite* platforms is clearly limited by the concluding words of that clause to such platforms as are requisite whenever and wherever such methods of reaching said stations may be found necessary.

(5) That a power to construct and maintain platforms limited to those which are necessary to reach stations, cannot be held to authorize the extension of platforms already constructed which extensions of platforms are not necessary to reach the station; *and that*

(6) The elevated railroads in question have no right under the respective ordinances granted them, to extend the platforms upon their respective lines without some further grant by the city council, and that the permit was issued by the commissioner of public works without authority of law and was properly revoked.

Bill for injunction and cross-bill. Circuit court of Cook county Gen. No. 244,799. Heard upon motion for a temporary injunction upon the bill and affidavits in support thereof, and the separate answers of the City of Chicago and commissioner of public works of the city of Chicago. Heard before Judge Murray F. Tuley.

The facts are stated in the opinion.

Clarence A. Knight and *John J. Herrick*, for complainant.

Edgar B. Tolman, corporation counsel, and *John W. Beckwith*, assistant corporation counsel, for defendants.

Clarence N. Goodwin, for certain property owners.

TULEY, J.:—

This bill is brought to determine the right under three certain ordinances of the city of Chicago, to extend platforms in connection with the elevated roads erected under said ordinances, and to restrain the city of Chicago from interfering with their so doing, under a permit granted by the commissioner of public works.

The ordinances, upon which the right to extend such platforms is claimed, are:

First. That of the Northwestern Elevated Railroad Company, the complainant in this case. January 8, 1894, an ordinance was passed by the city council, granting to said railroad company the right to erect an elevated railroad in the north division of the city upon property acquired, or to be acquired, and to cross all intersecting streets; the main line of the road commencing at Monroe street, in the south division of the city, or at a street or point north of Monroe street, between Wabash avenue on the east and Market street on the west, thence crossing the Chicago river and extending in a north or northwesterly direction to the city limits. On the 24th of June, 1895, an amendment to said ordinance was procured from the city council whereby said railroad company's route was somewhat changed in the north division of the city, and it was permitted at the intersection of Michigan street and Wells street to proceed southerly in and along Wells street and over and across the Chicago river and across the Wells street bridge and thence continuing southerly in and along Fifth avenue to the north line of Harrison street in said city. But it was made a condition that the elevated railroad constructed in said Fifth avenue should be subject to the joint use of the said Northwestern Elevated Railroad Company, the Lake Street Elevated Railroad Company, the Metropolitan West Side Elevated Railroad Company, the Chicago and South Side Rapid Transit Company and the Union Elevated Railroad Company under all contracts then existing, or which might thereafter be entered into between said companies, or any of them, and upon the further condition that said Northwestern Elevated Railroad Company should, as to that portion of

said elevated railroad in said Fifth avenue between Lake street and the southern terminus of the railroad in Fifth avenue, enter into a contract with the Union Elevated Railroad Company to lease it the said elevated structure to be built in said Fifth avenue, and that the said Union Elevated Railroad Company should construct and maintain the same.

The Lake Street Elevated Railroad Company had been organized with the view of constructing an elevated railroad upon said Lake street mainly in the west division of the city of Chicago, with an eastern terminus at Market street in the south division.

The Metropolitan West Side Elevated Railroad Company had been organized for the construction of an elevated railroad in the west division of the city of Chicago with a terminus in the south division at a point on Franklin street between Jackson and Van Buren.

The Chicago and South Side Rapid Transit Company had been organized for the construction of an elevated railroad in the south division of the city with the northern terminus at Congress street.

Before the passage of said amendment to the ordinance of the Northwestern Elevated Company, the city council had passed an ordinance by which the Lake Street Elevated Railroad Company was authorized to build its elevated structure from said Market street to Lake street and thence eastward upon Lake street to the east line of Wabash avenue in said city.

The Union Elevated Railroad Company (referred to in the amendment to complainant's ordinance), on the 14th of October, 1895, obtained authority of the city of Chicago by ordinance to construct and maintain an elevated railroad in Wabash avenue, from the north line of Lake street southerly, in and along Wabash avenue to the south line of Harrison street, with the right to make connection at Lake street with the Lake Street Elevated, and with the Chicago and South Side Rapid Transit Company's railroad at any point north of the south line of Harrison street between Wabash avenue and Fifth avenue. This ordinance contained substantially

similar provisions as to the use—of the tracks authorized to be laid—by the elevated railroad companies mentioned in the amendment to complainant's ordinance.

In June of the next year, being 1896, the last of the four ordinances running to elevated railroad companies (a part of each of which formed what is now known as the Union Loop) was passed. It was an ordinance running to the Union Consolidated Railroad Company, authorizing it to construct its elevated railroad in Van Buren street at its intersection with Wabash avenue, connecting with the tracks of the Union Elevated Railroad Company in Wabash avenue, then running westerly along Van Buren street across the bridge over the south branch of the Chicago river, to the tracks of the Metropolitan West Side Railroad Company in Van Buren street, at a point about two hundred feet east of Halsted street, and to make certain connections with said Metropolitan Railroad Company, and to connect the track authorized to be constructed in Van Buren street with the tracks of the Union Elevated Railroad Company in Fifth avenue (being the same which complainant was required by the amendment to its ordinance to lease to said Union Elevated Railroad Company), for the operation of the loop system.

This ordinance provided that the part of the elevated railroad structure authorized by the ordinance, between Wabash avenue and Fifth avenue, should be subject to the joint use of the Northwestern Elevated Railroad Company, the Lake Street Elevated Railroad Company, the Metropolitan West Side Elevated Railroad Company, and the Chicago and South Side Rapid Transit Company, and the Union Elevated Railroad Company, upon such terms and conditions as had been agreed upon in all contracts now existing between such corporations mentioned or such contracts as might be entered into between the said companies or any of them, for the use and operation of the said railroad authorized by that ordinance. The ordinance does not define the route of the so-called union loop system. Said ordinance also provided that the permission and authority, rights and privileges in said ordinance conferred upon said last mentioned roads should be extended

to and conferred upon the respective successors and assigns of each and every of said railroad companies, —“and in furtherance of the object and purpose to have constructed the loop line contemplated by the several ordinances heretofore passed, granting to the said last named corporations, either severally or jointly, permission and authority to construct and operate elevated railroads in the city of Chicago, every and all acts or deeds of transfer of rights, privileges or franchises, and all contracts, mortgages, deeds of trust, leases, stipulations, licenses and undertakings made, entered into or given between the said corporations, or between any two or more of them, or between any one or more of them, and any other person or corporation respecting or concerning their several railways or the construction thereof, or the use and occupation of the same, are, and every such act, deed, contract, mortgage, lease, stipulation, license or undertaking is hereby approved, ratified and confirmed, and the same shall be deemed and held as valid and effectual to all intents and purposes as if made a part and the same are hereby made a part of the said several ordinances,” but such act, deed, contract, mortgage, lease, stipulation, license or undertaking nowhere appears in the evidence or in the council proceedings offered in evidence.

The complainant in this case claiming to have succeeded to all of the rights of the respective railroad companies, part of whose lines constitutes the said union loop, on the 27th day of May, 1903, obtained a permit from the commissioner of public works for the extension of the platforms of the elevated structure built upon said Fifth avenue from Lake to Van Buren, and that built upon Van Buren from Fifth avenue to Wabash, and that built upon Wabash from Van Buren to Lake street, in accordance with the plan or plat showing such platform extensions.

The commissioner applied for and obtained from the law department of the city of Chicago an opinion that “If the proposed extensions on these three streets, or either of them, would unnecessarily impair the usefulness of the street.” it would have no authority to grant the desired permit. There-

upon on the 27th day of May, 1903, a permit was issued to the complainant. The complainant immediately entered into contracts with several parties for the construction of such extensions of platforms and commenced work upon the same.

There was a change in the head of the law department of the city, and the question as to the right of the complainant to have such permit being brought before him, he promptly decided that the complainant had no right to such permit; thereupon the commissioner of public works, under the advice of the new corporation counsel, rescinded the permit which he had already granted. The work was stopped and this bill was filed.

The bill sets out the three ordinances hereinbefore referred to; the building of the elevated structure as authorized by said ordinances, respectively; which structures, together with that built upon said Lake street, from Fifth avenue to Wabash avenue, constituted what was called the "Union Loop," that the operation and control of so much of said elevated structure as constituted such union loop, had been transferred to the complainant, the Northwestern Elevated Railroad Company; alleges that by reason of the increase of travel upon said railroads and said loop, the necessity arose for the extension of said platforms in order to accommodate such increased travel; alleges the application for said permit as herein stated; its issuance and the subsequent revocation thereof as before stated; alleges the expenditure of a large amount of money in the construction of said extension platforms and the making of contracts for the same, amounting in the whole to some \$70,000 or \$75,000, and prays for a decree finding and determining that complainant had the right, under the ordinances as set forth in said bill and under the permit issued by the commissioner of public works, to alter and extend the platforms of its various railroad stations, located on Wabash avenue, Van Buren street and Fifth avenue, in accordance with plans theretofore submitted and approved by the commissioner of public works, as set forth in the bill; that the order issued by the commissioner of public works on the 2nd day of October, revoking the permit issued by him for

doing such work and ordering said work to cease, should be utterly void and of no effect, and that the defendants may be perpetually enjoined from interfering with complainant in the work of extending and altering the platforms of its stations and for a preliminary injunction. The commissioner of public works and the city of Chicago are made parties defendants.

The commissioner of public works answered the bill, admitting in substance, the passage of the ordinances to the several railroads as set forth in complainant's bill, putting the complainant upon proof as to many of the allegations, but as to the permit, admitting the issuance of the same upon the opinion of the then corporation counsel, and alleging that he understood that the opinion was that the complainant had a right to the permit if the work should be so constructed and maintained as not to unnecessarily impair the usefulness of the streets, avenues or alleys, or any portion thereof; which he, the said commissioner, understood referred only to the physical obstructions to the surface of said street and not the placing of any obstruction above the surface of such street, and that, under such misapprehension, he issued the permit. But that afterwards, upon an examination of the work as it was progressing under said permits, he, the commissioner, decided that the said lengthening of the platforms was unnecessarily impairing the usefulness of said streets, and that on about the 13th of October, 1903, he revoked all permits given for the extension of said platforms, setting forth the opinion given him by the new corporation counsel.

The city at first demurred to the bill of complaint, and then filed an answer, which answer challenges the validity of all three of the ordinances for which the permit issued for the extension of platforms upon their lines respectively; the principal ground being that the city council did not have jurisdiction or power to pass either of said ordinances, for the reason that it did not have before it the petition of the owners of a majority of the frontage of the street upon which said ordinances authorized the erection of an elevated railroad, said petition being a necessary prerequisite to the jurisdiction

of the council to confer the privileges and rights enumerated in said ordinances respectively. Also challenged the right of either of said railroads to erect stations in the public streets, to use them for commercial purposes, and also attacked the validity of said ordinances on the ground that the railroads authorized by them had not been built between the termini mentioned in them respectively, and upon other grounds unnecessary to mention at this time.

By agreement in open court, when the motion in this case for temporary injunction came on to be heard, a date was fixed for the hearing of it, and also a date for the filing of pleadings and affidavits in support of the motion.

In support of the complainant's bill, several affidavits were filed, showing that the travel upon this so-called loop had been increased from the commencement of its operation in 1897 or 1898 from 150,000 passengers daily to over 300,000; that at certain hours in the morning and afternoon, called "rush hours," there was much congestion at the depots and upon the platforms from which passengers arrived and departed, whereby parties traveling upon such elevated railroads were subject to very considerable inconvenience and delay. Also there was presented a report of a celebrated railway expert, one Arnold, made to the city council upon his employment by the council, but which report was never acted upon by said council except to spread the same upon the record, in which report it was stated, in substance, that the capacity of the present double track loop is limited to the maximum number of trains which it is possible to pass in all directions through the junction points, and that the capacity of the junctions cannot be increased; that under existing conditions, however, it is the station platforms of the loop and not the junctions which limit the number of trains that can be operated over its tracks; that these platforms are much too short to admit trains being operated at intervals and speeds which will exceed the capacity of the junctions, and should be lengthened sufficiently to permit two trains of five cars each to simultaneously occupy the platform. That at the present time during the hours of maximum traffic the average time consumed by a train in making

a complete circuit of the loop is twenty minutes, but if two trains of five or six cars each could simultaneously occupy a platform, the time would be reduced to fifteen minutes. That there are eleven stations on the loop at which all trains stop, and under the present conditions each train must be retarded and accelerated twenty-two times instead of eleven times, as would be the case if the train could approach the station platform without having to wait for the preceding train to move out of its way. That the extension of these platforms sufficiently to provide for the accommodation of two full trains at the same instant is the only method by which the present capacity of the two-track loop structure can be increased. The report of Arnold was supported by affidavits of officials connected with the operation of the elevated roads using the union loop.

It should be stated that the report of Arnold also states that: "Should the time ever come when all the elevated railroads are consolidated under one control and passengers are transported within the district served by all of the companies for one fare, the problem of increasing the loop capacity would cease to be a problem, as the tracks now forming the loop, by slightly changing the present junction points, would become a simple section in the through lines that would be operated between the north, south and west divisions."

The motion for a temporary injunction was ably argued at great length by the respective counsel, and many authorities were cited.

In considering the question as to the right of the complainant to have the permit issued by the commissioner of public works for the extension of the platforms in question, it must be borne in mind that the operation of elevated railroads upon the said loop is by authority of the four ordinances:

1. The Lake Street Elevated, authorizing it to extend its elevated structure from Market to Wabash avenue, making one side of the loop, and amendment thereto.

2. The ordinance of the Northwestern Elevated Company, authorizing the erection of a structure on Fifth avenue, making another side of the loop.

3. That to the Union Elevated Company, which makes the Wabash avenue side of the loop; and

4. That to the Union Consolidated Elevated Company, which makes the Van Buren street side of the loop.

There is no loop ordinance for a continuous railroad around this loop, but the authority is derived from the ordinances authorizing the erection of said railroads upon the four sides, as before mentioned.

If the complainant has any right to a permit for the erection of the platforms in question, it must be found in each of the said four ordinances as to the platforms to be erected upon the line authorized by said ordinances respectively.

I did not overlook the rather vague reference, in the Union Consolidated Elevated ordinance for Van Buren street, to the loop system and its operation. That would confer no power as to the other elevated structures authorized, which constitute with it the remaining portions of the loop; admitting that the complainant has succeeded to all the rights of the grantees in the ordinances, parts of the lines authorized by which, constitute such loop, it does not acquire any additional rights by so doing. As purchaser or assignee or by contract obtaining the control of all elevated structures constituting said loop, the complainant's right to have an extension of platforms must be found in the said four ordinances, respectively, a part of the lines of which as before stated, constitute said union loop.

It is not contended that the act of the commissioner of public works in issuing the original permit, gave the complainant any right to have such extension of said platforms if the complainant had not the right under the ordinances referred to.

The right to exist as an elevated railroad company was derived by the complainant and the other grantees in said ordinances from the state, but the right to occupy any of said streets by elevated railroad structures and the extent of its occupation, the grantee in such ordinances derives exclusively from the city by virtue of the ordinance to such grantee, respectively.

The provision in the respective ordinances in question that the tracks authorized to be laid by the ordinances should be

subject to the joint use of other named elevated railroads, gives to such elevated railroads no power as to the extension of platforms which is not conferred upon the railroad whose track they use.

It has always been the policy of the state of Illinois that the municipalities should have the control of the streets within their limits. *Snell v. Chicago*, 133 Ill. 413.

This control over the streets by municipalities is guaranteed by the state constitution, section 4, article II, which prohibits the general assembly from passing any law granting the right to construct and operate a street railroad within any city, without the consent of the local authorities having the control of the streets, or highways, proposed to be occupied by such street railroad, and limits the power of control of the streets (See Hurd's Statutes, page 429), by requiring a petition to the city council of the owners of the land representing more than one-half of the street frontage as a condition precedent to the granting the use of the street, for an elevated railroad in the street, or of so much thereof as is sought to be used for railroad purposes, thereby also recognizing that abutting property owners have a special interest in the use of the street over and above that of the public at large.

This control of the city over the streets must be within the limits of its charter power. The title of the streets, the fee, is vested in the city, but the city does not own the streets as an individual owns his lot, or a piece of real estate, but the city owns and holds and controls the streets as trustee only. "The fee is vested in the city for the use of the public, and their free and untrammelled use belongs to the public. *Snell v. Chicago, ante*. And the fact that the city owns and controls the streets only as trustee with limited powers as such trustee, should be kept steadily in mind in the consideration of the questions involved upon this motion. The ordinances referred to, therefore, are the only authority which these elevated railroad companies have to use the streets of the city for their corporate purposes.

The complainant's rights to the extension of these platforms depends upon the authority conferred by said respec-

tive ordinances, and the construction to be placed upon such ordinances. The authority in regard to the construction of platforms is substantially the same in each one of the three ordinances in question, the Northwestern Elevated, the Union Elevated and the Union Consolidated Elevated Railway Company.

It is only necessary to refer to a part of sections 5 and 7 of the original ordinances to the Northwestern Elevated Railroad Company, which sections become applicable to the elevated railroad and structure erected in Fifth avenue under the amendment to said ordinances, passed June 24, 1895, Section 5, after providing that the tracks shall be used for passenger trains only and for accommodating and handling passenger traffic and the mails exclusively, provides: "To which end the said company shall cause its trains to be regularly and systematically moved at such intervals as shall be necessary to accommodate the public, and the number of all such trains, and the frequency with which they are moved, shall be increased as rapidly as the demands of the public shall render necessary and the increase of traffic warrant."

A similar provision is found in each of the ordinances. The duty enjoined here would probably necessarily be implied without any special provision to that effect—implied subject to the limitation that such duty should be performed so far as the rights or franchises conferred by the ordinance would admit.

Section 7 of said ordinance is as follows: "Sec. 7. The said company shall have permission and authority, and the same are hereby given and granted to it, to construct and maintain over the streets, avenues and alleys, or portions thereof, across which its said elevated railroad is to be permitted to be constructed, as aforesaid, all necessary or proper stations, platforms and depot stations, and to connect the same with said streets, avenues and alleys by means of all necessary stairs, stairways, elevators, landing places, and other constructions and appliances for ingress, egress and the accommodation of passengers; but such platforms, stations, stairs, stairways, elevators, landing places, etc., shall be so constructed

and maintained as not to unnecessarily impair the usefulness of such streets avenues or alleys, or any portion thereof. Neat and commodious passenger stations of easy and convenient access shall be provided, and all such station buildings and appurtenances, and likewise all passenger cars—when the latter are in use—shall be comfortably heated during the winter months, or whenever necessary at any season, and they shall be properly lighted with gas, electricity or otherwise, and thoroughly ventilated at all seasons. The platforms of all of said passenger stations shall be free from obstructions or projections of any kind; and all of said platforms and lines of stairs leading to and from the same shall be securely protected by strong wrought iron or steel railings, not less than three and one-half feet high. The permission and authority to locate, construct and maintain all such requisite platforms, landings and lines of stairs leading to and from the sidewalks of the streets, avenues and alleys, and the said elevated stations, being herein expressly granted said company, whenever and wherever such methods of reaching said stations may be found necessary.”

I shall assume that this section confers upon the railroad as full authority and rights as to the elevated structure constructed under the amendment to its original ordinance as is given to the Union Elevated and Union Consolidated Elevated under their respective ordinance.

The case of *Tudor v. The South Side Rapid Transit Company*, 154 Ill. 129, holds, that ordinances of this nature (that is, granting the right to use the streets of a city), passed by the city council of the city of Chicago under and by virtue of its charter power, have all the force and effect of an act passed by the general assembly of the state. The same rule of construction that would be applied to an act of the general assembly of the state, granting the right to a railroad company to occupy the streets of the city of Chicago (assuming that the state was not prohibited by the constitution from so doing), should be applied to the ordinance of the city of Chicago granting the rights and privileges in regard to the occupation of the street by a railroad company. In other words,

the ordinance has all the force and effect of a statute law as to the right of the railroad company to use the street and as to the manner in which it shall occupy the same.

The object in construing any statute or ordinance is to ascertain the legislative intent. If the language of the ordinance appertaining to platforms, in clear and explicit language confers the right upon complainant to have an extension of these platforms, there is no room for construction, and all the court has to do is to give effect to such express language. But, if the language is not clear and explicit, then it is a question of reasonable intendment in view of all the circumstances of the case. Lewis, Eminent Domain, secs. 254, 255.

This legislative intent is to be ascertained, in the first place, from the terms of the ordinance, and in the second place, by the application of such terms to the subject-matter.

The section quoted gives authority to construct and maintain over and upon (in this case in Fifth avenue, from Lake street to Harrison): "all necessary or proper stations, platforms and depot stations, and to connect the same with said streets, avenues and alleys by means of all necessary stairs, stairways, elevators, landing places," etc., and the latter part of the section, so far as quoted, provides: "The permission and authority to locate, construct and maintain all such requisite platforms, landings and lines of stairs leading to and from the sidewalks of the streets, avenues and alleys, and the said elevated stations, being herein expressly granted said company, whenever and wherever such methods of reaching said stations may be found necessary."

The power given the company to construct and maintain requisite platforms, is clearly limited by the concluding words of that clause to such platforms as are requisite whenever and wherever such methods of reaching said stations may be found necessary—limited by confining the power to erect and maintain platforms necessary to reach the stations.

It will be kept in mind that the ordinances recognize the right of the railroad company to locate its stations upon its own property, purchased or condemned, for its railroad uses.

but a power to construct and maintain platforms limited to those which are necessary to reach the stations, cannot, by any reasonable construction, be held to authorize the extension of platforms already constructed, which extensions of platforms are not necessary to reach the stations. So far as appears, platforms necessary to reach the stations were constructed when the road was built.

I am of the opinion that the limitation as to being necessary to reach the stations, destroys the force of the contention that it authorizes an extension of platforms already built.

But, the forepart of the section 7 quoted, gives authority to construct and maintain all necessary or proper stations, platforms and depot stations, and the broad question is, whether that clause, taken in connection with the subject-matter, confers upon the railroad the right to extend its platforms or to have a permit for the extension of its platforms whenever, by reason of the increased traffic, such extensions are found necessary or convenient for the accommodation of such travel.

It must be admitted that upon the face of the section in question, there is no express reference to or power given to extend platforms, or for the extension thereof.

If such power to construct and maintain necessary platforms had the words, "and extensions thereof," following the word "platforms," or, if it had read, "to construct and maintain from time to time such platforms as might be necessary," or, if it had read, "to construct and maintain such platforms as may from time to time become necessary, or be necessary," the ordinance would have conferred the power in clear and explicit terms, and the omission of any reference to the extension of platforms or to constructing and maintaining platforms in the future, must, to say the least, raise some doubt as to whether it was the intention of the city to confer upon the railroad by the use of the words "to construct and maintain all necessary platforms," "the power to extend such platforms when such extension became necessary."

Learned counsel for complainant contends that the power to construct platforms confers the power to extend platforms,

upon the ground that the greater includes the less. This appears to the court to be begging the question.

The ordinance requires a section of the proposed elevated structure to be presented to and approved by the commissioner of public works, and especially provides that the plans and specifications of such depots, platforms and stairs, shall be submitted to and reported by the commissioner of public works before the work of construction thereof shall be commenced. If A should give to B a right to construct and maintain upon his land a house with necessary platforms or verandas, the plans and specifications of such platforms and verandas to be submitted to and approved by C before the construction thereof shall be commenced, it is clear that such authority to construct and maintain such house with such platforms and verandas as C might approve, would not authorize B to make any additions to such house, or to the platforms or verandas.

The requirement that the plans and specifications of the depots, platforms and stairs shall be submitted to and approved by the board of public works before the erection thereof shall commence, qualified the words "necessary depots, platforms and stairs," and identified and limited them to those so submitted and approved.

Clearly, upon the authority of *Sexton v. City of Chicago*, 107 Ill. 323, if a contract had been made for the erection of the elevated railroad structure and necessary depots, platforms and stairs as required by the ordinance, the requirement that the plans and specifications for such depots, platforms and stairs were to be submitted to and approved by the board of public works, would have to be limited and controlled as to the amount of work to be done under such contract; or, if an ordinance should be passed authorizing a company to construct and maintain in a public street a market house with necessary platforms and porches according to plans and specifications to be submitted to and approved by the commissioner of public works, and rent stalls in the same, it would scarcely be contended that it conferred a right to ex-

tend the market house or its platforms and porches from time to time as the increasing growth of the city might demand.

It will be noticed that the power to construct and maintain necessary platforms is used in connection with and with reference to depots (or stations). Depots, platforms and stairs are made a class unto themselves, and are the only part of the elevated structure, plans of which are required to be approved by the commissioner of public works.

It must be admitted that where there is an ambiguity in a law or ordinance, practical construction given the same by executive officers charged with its execution should be considered, and when the acts are repeated, and for a considerable length of time, they may have great and even controlling weight, and under certain circumstances, may be conclusive by way of equitable estoppel. But this is no such case.

It is claimed that the commissioner of public works has issued permits under various ordinances concerning elevated railway companies in this city.

The first permit referred to is one issued in February, 1899, to the Lake Street Elevated to lower the elevated structure between Forty-sixth and Fifty-second streets, and to build a station according to a plat, and under which two new platforms, one hundred and fifty-three feet in length, extending over a part of Lake street, were built. The city contends, not without some grounds therefor, that this was done under a power to make a connection at the point indicated, and that the evidence does not show that there was no other authority than that contained in the ordinance. It is sufficient, in my opinion, to say that the power to issue permits to build or extend platforms under the Lake Street Elevated ordinance is not now before the court. It is only as to platforms under the three ordinances, the Northwestern Elevated, the Union Elevated, and the Union Consolidated Elevated, that are in question.

The second permit was to the Northwestern Elevated, April 21, 1899, and was to construct an extension to the platform on the west side of Fifth avenue south of the intersec-

tion of Lake street, such extension being some forty-eight feet long and eight feet wide.

The third was a permit to the Lake Street Elevated, by the building commissioner, to erect a frame station and waiting room at Fifty-second and Lake street. The power to do this, under the Lake Street Elevated ordinance, is not before the court, nor is it shown that it issued under no other authority than the ordinance.

The fourth was a permit to the Metropolitan West Side Elevated, December, 1902, to build an extension of a platform on the Franklin street station. The same objection as to the last applies.

The fifth was for a permit for the extension of the platform at Wilson avenue and Evanston avenue over private property of the Northwestern Elevated Company. It would be carrying the doctrine of practical construction entirely too far to hold that the action of the executive officers of the city, in regard to permits issued under ordinances other than those in question in this case, could have any weight with the court in determining the question whether these ordinances as to the elevated structure at Fifth avenue, Wabash and Van Buren street, conferred on the grantee in those respective ordinances the power to extend platforms.

The practical construction of executive officers must rise from acts done under the law or ordinance to be construed, but not under other ordinances or laws. Even if such other ordinances or laws were similar in substance, the proof does not show that there was any express authority other than that contained in such other laws or ordinances.

The acts relied upon were so few and the time in which they were performed so short as to entitle them to but little, if any, consideration of the court in the construction of the ordinances in question.

The same may be said as to the effect of the alleged acquiescence. In fact, there is no evidence to show that the city council ever knew of such acts of practical construction, and there could be no practical construction and no acqui-

escence which would bind the city without such knowledge, either actual or presumed.

The claim that the city is estopped by acquiescence in the alleged acts of construction, has no foundation in the evidence or in the law applicable to the facts in this case.

Where the law or the ordinance does not confer the power claimed, in clear and explicit words, as I have held is the case as to the three ordinances in question, what rule of construction should apply?

The counsel for complainant admits that where there is a grant in derogation of private rights, it must be strictly construed, but contends that the cases distinguish between a grant of power as to the location of the termini of a railroad and the grant of power in connection with the operation of the road.

That, in the first place, the doctrine of strict construction—that nothing is to be taken by intendment—applies, and the power when once exercised is exhausted while in the second case the construction should be liberal to effect the object and purposes of the grant, and, consequently, the power—as, for example to construct necessary sidetracks—is not exhausted by one exercise of the power but is a continuing power.

A leading case in this state, often cited in other reports, is found in the 17th Ill., page 123, the case of the *C., B. & Q. Railroad Company v. Wilson*. By its charter the railroad company was authorized to maintain and continue a railroad with single and double track on a prescribed route, “with such appendages as may be necessary for the convenient use of the same, and to acquire the right of way or title to land necessary.”

In two or three years after the location of the railroad, it filed a petition to condemn land for constructing and maintaining thereon turn-outs, depots, engine houses, shops and turn-tables. The court held that the grant to a railroad company to construct a road with such appendages as may be necessary for the convenient use of the same, will authorize

it to acquire land by condemnation for shops, etc., these being necessary appendages; that "This power is not exhausted by an apparent completion of the road if an increased business demands other appendages or more room for tracks."

The court held in this opinion that: "There can be no doubt that the legislature intended to embrace all such conveniences as would be necessary for the successful conduct of the business of the road, as depots, repairing shops, and the like, under this general designation without particularly specifying either. The history of this class of our legislation shows that such was the intention and understanding of the legislature. In some railroad charters more, and in some less, of these conveniences are specially authorized, while in others none are particularized, while in all cases, lest some should be omitted, some general expression is used with the manifest design to cover all that may be found useful and convenient."

And upon the point as to whether a road having been actually completed and running, the power to condemn land, either for tracks or other appendages, is exhausted, the court says:

"It would be a disastrous rule, indeed, to hold that a railroad company must, in the first instance, acquire all the grounds it will ever need for its own convenience or the public accommodation. * * * We cannot suppose that it was the intention of the legislature to oblige the company to acquire all the land in the first instance, which, in any event, it should ever want, to do the largest amount of business it may ever hope to attain," and "we are of the opinion that the company still has the right to acquire such lands as it may need for the accommodation of its business, from time to time, by the coercive process pointed out by the law." This case has been followed by: *Fisher v. C. S. R. R. Co.*, 104 Ill. 323; *McCartney v. C. & E. R. R.*, 112 Ill. 611; *Kotz v. I. C. R. R.* 188 Ill. 578, and by the following cases bearing on the rule of construction to be given analogous provisions: *C. & W. I. R. R. Co. v. Ills. C. R. R.*, 113 Ill. 156; *W. Chi. Park Com'rs v. McMullen*, 134 Ill. 170.

Another leading case is found in the 16th Ohio State Re-

ports (*T. & W. R. R. Co. v. Daniels*, 16 Ohio St. 390), wherein it was held that "A railroad company has power to condemn land for new sidetracks, leading from the main road to its depot buildings, whenever they become necessary in the proper management of the road."

In that case it was contended that the power to condemn land for sidetracks having once been exercised, it became exhausted, and therefore there was no power to condemn land for new sidetracks without further legislative action being had, but the court say: "It is true that grants of this nature, being in derogation of private right, must be strictly construed. If, therefore, there is reasonable ground of doubt as to whether the legislature intended to grant the continuing power claimed to be exercised here, the doubt should be resolved against the company, and it must go back to the law-making power for a new grant." That court holds that: "The power to make 'necessary sidetracks' *prima facie* is the power to make them when they are necessary. Otherwise it would be the power to make unnecessary sidetracks. *Prima facie* power to do any act is power to do it in such manner and at such time as is usual, convenient and reasonable, in such way as prudent men manage their own concerns;" and quote with approval the case of the *C., B. & Q. Railroad Company v. Wilson*, 17 Ill. 123, above referred to, that: "It would, indeed, be a disastrous rule to hold that a railroad company must in the first instance, acquire all the ground it will ever need for its own convenience or the public accommodation," etc.

The two leading cases referred to, the 17 Ill. and the 16 Ohio State, have been cited with approval by Judge Brewer in *C., B., U. P. R. R. Co. v. A., T. & St. F. Ry. Co.*, 26 Kan. 669

The cases cited are only a few of the numerous cases to the same effect cited by complainant upon this argument. They are nearly all of them cases arising out of the exercise of the power of eminent domain. If the case at bar is to be governed by the decisions of the courts in this and other states as to the exercise of the power of eminent domain by surface

roads for the condemnation of land for the erection of side-tracks or switches, which, after the construction of the road, became necessary to its operation, the cases referred to would seem to be controlling. But this is not a surface railroad, nor is it a question of necessary sidetracks or switches to be placed on a right of way purchased or condemned for the operation of a surface railroad. Analogies are dangerous in judicial construction.

When we come to consider the subject-matter concerning which we are construing these ordinances, it will be seen that the subject-matter is different in many essential particulars from what may be said to be the subject-matter in the cases cited.

A railroad is authorized to acquire for the purposes of its road by the statute one hundred feet in width on the proposed line of road. This one hundred feet in width is called its right of way, which is devoted primarily to railroad purposes.

It is true that the constitution provides that railroads shall be public highways, but they are not public highways in the sense that a street is a public highway.

The question of the construction to be given to a law or ordinance, authorizing a surface railroad to construct necessary appendages, namely, engine houses, sidetracks or switches, upon its own right of way or to condemn private property therefor is a very different question from the one at bar.

It will scarcely be contended that the entire street constitutes the right of way of these elevated railroads like the right of way condemned or purchased for a surface railroad. The question here is not whether these elevated railroads shall have a right to condemn property for accessories rendered necessary by increased travel or whether they shall have the right to put such accessories upon their own right of way. They have no right of way in the public streets beyond that now occupied, and the question is: Shall they be allowed to take more of the public street than that originally granted them and now occupied by them?

We have a statute in this state making it the duty of all railroad corporations to keep their rights of way clear from all dead grass, dry weeds or other dangerous and combustible material, and for neglect so to do they will be made liable to certain penalties. In the case of *L. E. & W. R. R. Co. v. Middlecoff et al.*, 150 Ill. 27 (which was a suit against a railroad company for damages caused by fire from a locomotive setting fire to grass in the street which communicated to the plaintiff's premises), the railroad company had a city ordinance which granted it the right to lay its track in the street, and the question as to what constituted the railroad right of way in a street arose, and it was held that the right of way of a railroad company in the street of a city includes only that part of the street held and in actual use by such railway company, its main track, sidetracks, switches and turn-outs that are in any way connected with the main track and used by the railroad company for loading and unloading cars, or for storing cars. This case holds that the right of way of a railroad in a public street includes only so much of said public street as is actually occupied by such railroad company. Therefore, an elevated railway company's right of way in the street is confined to so much of the street as is actually occupied by it and to extend its structure in a public street is an extension of its right of way.

A number of cases have been cited as to the construction of grants to railroads to use streets of a city, among them the case of *McCartney v. C. & E. R. R. Co.*, 112 Ill. 611, where a grant was made to a railroad to build either a horse railroad or a steam railroad in a public street, and to use either horse or locomotive power. The company having first used horse power, some years afterwards desired to use steam power, and the supreme court of this state decided that, having used horse power, the right to use steam power still existed and was not exhausted by their having first used horse power.

Also, decisions from Missouri and Indiana and other states, that an ordinance to a railroad company to lay a single or double track, or single and double tracks, was not exhausted

by the laying of a single track when the same, by reason of increased travel, became necessary. *Ransom v. Citizens' Ry.*, 104 Mo. 375, 16 S. W. 416.

Also a case is cited from 85 N. W. Rep., in which the question was as to the power of the city to require the laying of a grooved rail in place of one mentioned in the ordinance. *City of Kalamazoo v. Michigan Traction Co.*, 126 Mich. 525, 85 N. W. 1067.

The main case cited upon this point is found in the *Detroit Citizens' St. Ry. Co. v. Bd. of Public Works*, 126 Mich. 554. In that case the Citizens' Railway Company was, by an ordinance of the city of Detroit, given a right to construct and maintain a single track in a certain street, and to construct and use necessary and convenient tracks for turn-outs, side-tracks, curves and switches, wherever the same might be necessary. Some years after it began operation, it claimed the right to lay down in the street a new switch track, and instituted a proceeding by mandamus against the commissioner of public works of Detroit to compel him to issue a license so to do. Mandamus was ordered by the lower court and appealed to the supreme court. The supreme court, in its opinion, cited certain provisions of the Detroit city charter, and held that these gave legislative power to the city council and the administrative power to the board of public works, and affirmed the opinion of the court below. The division of powers which existed under the charter of the city of Detroit once existed under the charter of the city of Chicago, but does not exist under the present charter. Under the present charter the powers of the board of public works are derived from the ordinances of the city, and it has no independent administrative power granted it by the legislature. In that respect the case differed from the one at bar.

The supreme court, while it held that the court below properly held that "the relator's right at the time of the construction of its road to lay switches, etc., was limited by public convenience, and it would not then have been permitted to lay more than the then traffic demanded; and that when

public travel demanded more, the relator could be compelled to lay them," but they also said "that the sole contention is that the power to act lies in the common council and not in the board of public works," holding, as stated, that under the peculiar provisions of the charter, the administrative power to act was in the board of public works. That case also differs from the present in this: there was power given to lay sidetracks and switches wherever the same might be necessary, which, it may be reasonably contended, indicated a provision as to future necessities.

But there is a vital difference between a surface railroad and an elevated railroad. The difference is so vital as that in the opinion of the court the decisions referred to should not control in the case at bar. When a surface railroad exercises the power of eminent domain against private property for an additional switch rendered necessary by the increase of business, it is compelled to make compensation to the owner of the land. When it lays down additional switches, sidetracks, and turn-outs, on the surface of the street, while it may or may not to some extent obstruct the general public in the further use of the street, it does not prevent the general public from using that street. The use of a street by a railroad is recognized by our supreme court to be a legitimate method of travel in the street, and that it is to be used in common with the general public, and any ordinance or provision by which it is to have exclusive use of the street is beyond the power of the city to grant, because of the trust character in which the city holds title of the street and the power to control it. See the *Ligare* case, 139 Ill. 46.

It must be admitted that the evidence shows that the travel upon this loop has increased from 150,000 to 300,000 daily, and that travel upon the loop is badly congested at certain hours of the day. It must also be admitted that extending the platforms to double their present capacity, would enable two trains of five or six cars each to load and unload at the platforms at one and the same time, while, as at present constructed, the platforms will admit of the loading and unloading of but one train of five cars. It must also be admitted

that Arnold's report, and the affidavits in evidence, shows that by such extension the congestion of travel upon the road can be materially relieved, and the time of the running of the loop be shortened from twenty minutes to fifteen, if the platforms were extended all around the loop, as two trains running together would make but one stop at eleven stations each of the loop, instead of making twenty-two stops in place of eleven at the platforms as now constructed. Arnold's statement and calculation was made, considering the loop as a finished whole, but there was no permit issued or applied for to extend the platforms of the Lake Street Elevated side of the loop, as the Lake street ordinance expressly limits the length of the platforms and stations to one hundred and eighty feet. It is only as to three sides of the square forming the loop that the permit of the commissioner of public works was issued which is now in controversy. It is clear that as to the Lake street side of the loop the complainant must go to the city council, and that the running time of the loop saved by the extension of platforms on three sides of the loop would be of little consequence, as each train must stop singly at the two Lake street stations.

Counsel, in the argument, contended that the full five minutes could be saved by the trains skipping one station on the Lake street side of the loop. The stations having been fixed by the ordinance, it would seem to demand that all trains must stop at all the stations.

But Mr. Arnold also says that the congestion on the loop can be remedied by the roads using the loop making through running arrangements with each other. Therefore, the extension of the platforms is not an absolute necessity, and if it is to be presumed that while the council in passing the ordinance took into consideration that the future growth of traffic on the several railroads might require additional platform facilities, it must be also considered that the council knew that in case the loop became congested, the railroads using the loop, by agreement between themselves, could relieve that congestion by making through running arrangements. It is possible that the latter consideration influenced the council in

not providing in express terms for the extension of platforms. It may also be presumed that the council took into consideration that with the growth of the city the travel on the surface tracks and on the surface of the street might also be congested, and did not intend to add to such surface congestion by authorizing further encroachments thereon by the elevated railroads.

There is no doubt but that the portion of the public using such elevated railroads or loops would be accommodated by such extensions of platforms and that the extensions would be useful and convenient to the patrons of the road and to the corporation, but so would platforms on both sides of the tracks for the entire circuit of the loop with exit stairs every half block be an accommodation, too, and useful and convenient to those who patronize the elevated roads, but the rights of the general public in the streets over and along which said elevated loop railroads are constructed and of abutting property owners are also to be considered in construing this ordinance. If platforms referred to in the permit were extended as demanded, Van Buren street, from the curb at Wabash avenue to the curb at Fifth avenue, or within a few feet of it, would have a covered way the entire distance of about sixteen hundred feet in length, the part thereof occupied by stations being two two-story structures which extend practically over the entire roadbed of the street and from lot line to lot line of Van Buren street and are included in such sixteen hundred feet. These extended platforms, one on each side of the street, would be ten feet in width and seven or more feet in height. The result would be to make Van Buren street, between Fifth avenue and Wabash avenue, dark, gloomy and unsanitary—practically a tunnel—because of the obstructions of the elevated structure thereon and the absence of sunlight and air. The platforms of the other streets would be extended to at least double their present length, and the result as to such other streets of the loop, namely, Wabash avenue, Fifth avenue and Lake street, embraced in this permit, would be substantially the same as Van Buren street.

The rule of the construction of these ordinances must clearly be that laid down by the United States supreme court, with regard to the construction of statutes. So far as the occupation of the street is concerned, the ordinance in question is similar in effect to a statute.

Statutes making grants to private corporations become subject, as regards the extent of the grant, to the universal rule that any doubtful points of construction shall be against the grantee and in favor of the public. *Oregon Railway & Navigation Co. v. Oregonian Ry. Co.*, 130 U. S. 1.

The court also cites the Charles River Bridge case, in the 11 Peters, 440, holding: "In this court the principle is recognized that in grants by the public, nothing passes by implication." Citing *Turnpike Co. v. Illinois*, 96 U. S. 63. "That a grant of franchise is to be construed most strongly against the donee and in favor of the public, and is not to be extended by implication."

This rule is recognized as applicable to railroads claiming rights in the streets of Chicago, by the case of *Chicago, D. & V. R. R. v. City of Chicago*, 121 Ill. 176, the principles of construction involved in said case being more pertinent to the case at bar than the cases relied upon by complainant.

A certain ordinance passed by the city of Chicago, after a careful mention and specification of the streets and alleys which might be used and crossed by the said road, contained a general clause giving the railroad authority "to lay down all such tracks, switches and turn-outs across any street and alley within the district aforesaid as may be necessary to the convenient use of any depot grounds said company now owns or may hereafter acquire in the vicinity and adjoining said line of road," and also to acquire and use such depot grounds, etc.

The company acquired freight depot grounds in the vicinity of the line of the road, and to reach the freight depot grounds built from the main track a spur which crossed—near said main line—a street called Ann, and then crossing Carroll avenue and North Curtis and North Carpenter streets.

The right to cross the streets named with this spur by virtue of the authority given by said general clause was challenged.

The supreme court say, after referring to the ordinance under which the railroad claimed the right to build this spur and cross the streets to reach the freight depot grounds: "Thus it will be seen that until this general clause in section 4 is reached, the authority which is given for the use of streets is specific, precise and most guardedly limited."

After quoting said general clause, the court holds: "There is no specific mention of streets in this general clause and to hold that under it any other streets might be used than those specified in the preceding part of the ordinance would make it indefinite and uncertain what streets might be made use of under this clause and leave it for the railroad company to determine. We do not think that was the intention of the common council, but it was their purpose to fix and limit precisely what streets might be used."

And that the true construction of the general clause was: "That it gave no authority in respect to the use of streets additional to what had been granted by the preceding part of the ordinance."

That, "under this general clause there was not given authority to make use of any other streets than those which the ordinance had specifically named might be used."

The elevated structure mentioned in the ordinances in question is described in great detail—except as to depots, platforms and stairs, "plans of which are to be approved by the commissioner of public works," thereby fixing and determining the part or quantity of the street that might be occupied by the elevated railroad, and to hold that by the use of the words "necessary platforms," in said section 7, it acquired a right to occupy more of the public street whenever increased travel on the road made it convenient or useful to the public, would be in opposition to the principle of construction laid down in said case of *Chi. D. & V. R. R. v. City of Chicago*, 121 Ill. 176. See also *People v. L. & N. R. R.*, 120 Ill. 48.

The rule of strict construction in favor of the public and

against the grantee of special rights or privileges in a public street is also recognized in *Snell v. City of Chicago*, 133 Ill. 413, in which the supreme court held that in the construction of such grants "they should be strictly construed in favor of the public and against the grantee of the privilege."

It must be constantly held in mind in construing these ordinances that the city does not own or control the streets as it does the engine stations or other property that it owns and controls. Its ownership and control of the streets is only as trustee and a trustee of limited powers.

As laid down in *Snell v. Chicago, ante*: "The fee of the streets is vested in the city for the use of the public and their free and untrammelled use belongs to the public."

This has been repeatedly held in this state. In *P., Ft. W. & C. v. Reich*, 101 Ill. 157, it is held that the ownership of the city is but nominal and is subordinate to the public trust for which the title is held. See also *Chicago v. Rumsey*, 87 Ill. 348.

And in the case of the *Chicago, Danville & Vincennes R. R. Co. v. City of Chicago, supra*, the court says: "The occupation of the streets of a city with a railroad track is of very serious concern, as regards the public and property owners upon the street, and a permission which is set up to so occupy a public street, should plainly appear, and not be left to be derived, by doubtful implication, from a generality of language which does not unmistakably manifest the intention to give such permission."

As was held in the *City of Chicago v. Wright*, 69 Ill. 318, 327, "The city has possession (of the streets) for the use of the public. The right of use is not limited exclusively to the citizens of Chicago, but the citizens of the state generally have an equal right with them in the appropriate enjoyment of the dedication. This was so held in *City of Alton v. Transportation Company*, 12 Ill. 60, and is a proposition that none can gainsay."

It must be borne in mind that the right of the public to the use of the streets is not confined to the surface of the streets. A street includes not only the portion of land between the

sidewalks, but the sidewalks also, and extends to the lot lines upon one side to the lot lines upon the other. It not only embraces the surface of the street between lot lines, but the earth beneath the surface and all above the surface between such lot lines. *McCormick v. South Park Com'rs.*, 150 Ill. 516.

The public have the right that God's sunlight and the breezes of heaven shall penetrate every part of such street, not only to the surface, but to all above the surface, and every encroachment upon such street, whether upon the surface or above the surface or below the surface, between such lot lines, is against the common right of the public—that the same shall be kept free and unobstructed.

While the surface railroad uses so much of the street as it occupies in common with the general public, to travel over, upon or across its track in a public street, the use and occupation of the street by an elevated railroad is not in common with the public, but is exclusive. That part of the street above the surface which it occupies is in its exclusive use and that part of the street which is necessary to support the structure is also in the exclusive occupation and for the benefit of the elevated road.

The structure in the street of a surface railroad and that of an elevated road are, as stated, so vitally different, that, in reason, the same rule of construction of ordinances granting the use of the street cannot be applicable to both, the occupation of a surface road being in common with the general public and the occupation of the elevated road being exclusive so far as it occupies the street. The construction of an ordinance as to powers granted the latter must not only be more strict than that of an ordinance granting powers to the former, but it must be held that different principles apply in making such construction.

In construing this grant to the elevated railroad, the character of the occupation granted to them must be kept in mind, and the *sui generis* character of such occupation. The city council was granting a right to build an elevated structure in a public street, every part of which structure was an in-

vasion of the common right of the public and of the private right of the abutters. When you attempt to add to that structure by extending covered platforms seven to ten feet wide and seven feet or over in height, it is, as to such additions or extensions, in the nature of extending the franchise of the company as to the location of its structure and the extent of its occupation of the street. It is a taking from the public so much of the street as is occupied by the extension or addition, and is a damage to the property abutting on such extension or addition. It is not unlike in principle to a surface road attempting to extend its *termini* or right of way after having once located the same, as to which the authorities are to one effect, that it cannot do it without a new legislative grant. See *People v. L. & N. R. R.*, 120 Ill. 48; *P., Ft. W. & C. R. R. Co. v. Reich*, 101 Ill. 157; *Chicago, D. & V. R. R. v. Chicago, ante*.

I am satisfied, for the reasons stated, and upon the authorities cited, that the ordinances in question must be liberally construed in favor of the city and against the grantees in said ordinances.

Considering these railroads as elevated railroads and the peculiar character of their occupation of the public street, the situation and circumstances under which the grants were made, and the absence of any express grant of the right to extend their covered platforms, the ruling of the court must be that it was not the intention of the city council to grant to the said elevated roads by the said ordinances the right to make extensions of their platforms.

Also that the permit in question was issued by the commissioner of public works without the authority of the city council and was by him properly revoked.

In conclusion, as to the contention that the city has been receiving compensation for these grants to the elevated railroad companies, in the way of a percentage upon the receipts of travel upon the loop, and should be held to be estopped from interfering with the extension of the platform in question—such estoppel arising from an implied obligation not to do anything which would prevent an increase of revenue from

the operations of the "Loop,"—it is not necessary to pass upon the validity of the action by which—without any prior or subsequent approval of the council—the mayor compelled these loop railroads to agree to pay into the city treasury a percentage (ultimately reaching twenty-five per cent.) of the receipts of the use of the loop. I will only remark that I am strongly inclined to the opinion that the city is without power (even by the joint action of the mayor and aldermen) to sell or barter away any franchise in the public streets for a compensation to be paid into the city treasury.

While the city has the fee, it does not own the street as an individual owns his own property. It holds the fee and the control of the streets as a trustee for the public, and in its control of the streets its ownership is subordinate to its duties as trustee. It is not a trustee for the inhabitants of the city, but it is a trustee holding and controlling the streets for the public use. *P., Ft. W. & C. R. R. Co. v. Reich*, 101 Ill. 157, *ante*.

By the public, or public use, is meant the people of the whole state.

In the case of *Scholl v. The German Coal Company*, 118 Ill. 427, 432, the court says: "The expression 'public use' *ex vi termini*, implies an interest or right of some kind in the public and as the public can have no existence separate and apart from the people, of which it consists, it follows that its interest or right, whatever it is, belongs to and is vested in the people."

The city, as a public trustee, is subject to the rule applying to all trustees, whether individuals or corporations, and that is that a trustee cannot control trust property for his or its own benefit.

In the case of the *City of Alton v. Illinois Transportation Company*, 12 Ill. 60, our supreme court say, in an action of ejectment brought by the city of Alton to try the right of the public to a certain piece of land as public highway dedicated to public use: "Whatever title these public grounds may be vested in the city, she has not the unqualified control and disposition of them. They were dedicated to the public for the particular purposes and only for such purposes can

they be rightfully used. For those purposes the city may improve and control them and adopt all needful rules and regulations for their management and use, but she cannot alienate or otherwise dispose of them for her own exclusive benefit nor are they subject to the payment of her debts. At most, she but holds them in trust for the benefit of the public. The right to the use of the property is not limited exclusively to the citizens of Alton, but the citizens of the state generally have an equal right with them in the appropriate enjoyment of the dedication." See also *City of Chester v. R. R. Co.*, 182 Ill. 382; *Ligare v. City of Chicago*, 139 Ill. 46; *P., Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157.

It follows that if this agreement for compensation to the city treasury was *ultra vires*, no estoppel can be placed upon the city for its action under an *ultra vires* contract. The city has power to exact a reasonable license fee for compensation for the extra cost it may be put to and the supervision and the use of its police made necessary by such use of its streets, but it cannot speculate or make money for its treasury—or its taxpayers—out of its exercise of the power to control the public streets as a trustee for the public.

During the argument I held that the contention of the city as to the invalidity of these ordinances did not arise necessarily upon the motion for a temporary injunction against the commissioner of public works. For that reason, I have not discussed the contention of the city that the elevated railroads have no right to the relief asked for, because no one of them has built its road for the entire *termini* of the grant—the Wabash avenue has not been built to Harrison nor the Van Buren to within two hundred feet of Halsted, nor the Northwestern and Fifth avenue grant has not been completed south of Van Buren street. Whether the (ordinance) grant to these railroads is subject to forfeiture—whether they can split their franchises—cannot be determined without proof as to the petitions to the common council upon which such grants were purported to have been made. The ordinances appear to be valid upon their face. The petitions are not before the court, nor is it necessary to determine the contention of the

city that there is no power conferred by the ordinances to build station houses in the public streets or to use such station houses for traffic in merchandise as alleged. These and other defenses set up by the city, cannot, as before stated, be decided upon this hearing.

The only question decided is that the elevated railroads in question have no right, under the respective ordinances granted them, to extend the platforms upon their respective lines without some further grant by the city council; that the permit in question was issued by the commissioner of public works without authority of law and was properly revoked.

The motion for temporary injunction will be denied.

(Superior Court of Cook County. In Chancery.)

Pinkerton, et al.

vs.

Grand Pacific Hotel Company.

(1903.)

1. **COURTS—CORRECTION OF RECORD.** The court in the exercise of its equitable power may properly correct its records and amend its orders and judgments, even after the term at which the order was entered has gone by. Such amendments, however, must be made from the minutes of the judge.
2. **SAME—BY WHOM MADE.** The power to amend the record of the court rests only in the particular court where the error occurred.

Bill by complainant to set aside judgment of dismissal in suit between same parties. Demurrer to amended bill. Heard before Judge Jesse Holdom.

For statement of facts see opinion.

Munn & Wheeler, solicitors for complainants.

Francis A. Riddle, solicitor for defendant.

HOLDOM, J.:—

A general demurrer is filed by defendants to the bill of complaint as amended, a demurrer having heretofore been successfully interposed to the original bill.

Briefly stated, the parties to this cause had a suit, on the common law side of the court, of complainants against the defendant, to recover a claim for services rendered by complainants, who were the well known detectives whose headquarters are in this city with branch offices in many parts of this continent.

The common law cause was on the calendar of his honor, Judge Kavanagh, and when reached for trial by agreement of the parties through their respective attorneys, they each being represented by the same counsel as appear in this cause, a jury was waived and the cause submitted to the court for trial. The court proceeded to and did hear all the evidence adduced by each party and the arguments of counsel, and then took the case under advisement, with the request that counsel furnish written briefs to the court, which was done. In the meantime Judge Kavanagh went to the discharge of his *ex officio* duties in the criminal court and did not return again to the common law court until one year thereafter, without having in the meantime rendered any decision in the case.

New common law calendars were thereafter made up by the clerk of the court, and because no order had been entered of record submitting the cause to the court for trial without a jury, there was nothing on the record to apprise the clerk of the fact that the cause was then in the bosom of the court for final determination, and so he, in the regular order, put the case upon Judge Stein's calendar. Of this counsel for complainants had no notice; they rested in security, assuming that the clerk had done his duty and entered the proper orders, both of submission and taking under advisement. Counsel for defendant knew that the cause was on Judge Stein's calendar, but paid no further attention to it. On the regular call of the calendar, the cause being reached for trial and no one responding for either party, Judge Stein dismissed it upon his own motion. The term of the court at which it was dismissed, passed before complainants or their counsel discovered the condition of the record. The amended bill sets up in amplified form these facts, and the further fact that an appeal to Judge Kavanagh to set aside

the order of dismissal and enter into an order of submission, etc., was unsuccessful, and this equity side of the court is asked to do what the common law side thereof held he had no power to do. It is also admitted that the statute of limitations has not run as a bar against complainants' claim.

The correcting of the record of the court is in a proper case the exercise of its equitable power.

Such amendment must be made, if at all, from the judge's minutes.

In *Seeley v. Pelton*, 63 Ill. 101, the court said on page 105, "On a motion to correct the judgment after notice given, the same was done from the entry of the judge's minutes, the entry of the *remittitur* as it appeared from the record, and other evidence. We are satisfied that the amendment was properly made, as there was ample evidence in the minutes and proceedings of the court by which to amend."

Every decision quoted by the learned counsel for complainants affirmatively decides that the power to amend the record is in the court where the error occurred. *Howell v. Morlan*, 78 Ill. 162; *Gebbie v. Mooney*, 121 Ill. 255; *Railroad Co. v. Holbrook*, 72 Ill. 419; *Morrison v. Stewart*, 21 Ill. App. 113; *Gross v. Sloan*, 58 Ill. App. 302.

All of the foregoing cases either enunciate or proceed upon such theory.

It is urged that as counsel for defendant had knowledge of the cause being irregularly put upon Judge Stein's calendar that it was his duty to have either notified opposing counsel of that fact or to have seen that the cause was stricken from the calendar. As a matter of law counsel for defendant owed no legal duty to complainants or their counsel; they were on opposite sides of a law suit, each presumably watching with alertness for an advantage over his adversary. What the ethical obligation was under the circumstances I am not prepared to decide, nor would it be proper for me to do so. Both had equal opportunities, and both were charged with like diligence in conserving the interests which they respectively represented.

The demurrer to the amended bill will be sustained and the

amended bill dismissed for want of equity at the cost of complainants.

NOTE.—The court is empowered to amend the record and correct errors and mistakes of the judge or clerk even after the term has gone by. But such amendments must be made from the minutes of the judge or other reliable source. *Coughran v. Gutcheus*, 18 Ill. 390; *Wallahan v. People*, 40 Ill. 102, 103; *R. R. Co. v. Holbrook*, 72 Ill. 419; *Gillett v. Booth*, 95 Ill. 183; *Dougherty v. People*, 118 Ill. 160; *Gebbie v. Mooney*, 121 Ill. 255; *People v. Anthony*, 129 Ill. 218; *Ry. Co. v. Walsh*, 150 Ill. 607.—Ed.

(Circuit Court of Cook County. In Chancery.)

Slade, et al.

vs.

City of Chicago.

(July 29, 1903.)

1. **ORDINANCE REQUIRING IDENTIFICATION NUMBERS ON AUTOMOBILES, VALIDITY OF.** An ordinance of the city of Chicago requiring all automobiles operated in the city of Chicago to display for identification, numbers and letters as provided in the ordinance, *held*, upon an application for an injunction against its enforcement, to be a valid exercise of the general police power of the city, in connection with the express power to regulate the use of the streets.
2. **AUTOMOBILES—POLICE POWER OF CITY OVER.** The automobile is a class unto itself and no reason can be perceived why the police power shall not be exercised as to any specific class. And it is a proper exercise of the police power and of the power to regulate the streets, for the city council to place them under such restrictions as will enable the police to enforce against them the penalty for exceeding the speed allowed by the city ordinance, and also to enable the police to enforce other restrictions, such as in regard to lights, the observance of the laws of the road by such vehicles, etc.
3. **POLICE POWER OF CITIES.** The police power of the state is delegated to the cities under section 62 of the city and village act.
4. **POLICE POWER—EXERCISE OF BY CITIES—WHEN A JUDICIAL QUESTION.** It is for the city council to determine when an ex-

agency exists for the exercise of the police power, but what are the subjects of its exercise is clearly a judicial question. The exercise of legislative discretion is not subject to review by the courts when the measures adopted are calculated to secure the public comfort, safety or welfare, but the measure so adopted must have some relation to the ends specified.

5. **POLICE POWER OF CITIES, EXTENT OF.** The city council has no power under the guise of police regulation to arbitrarily invade the personal rights and personal liberty of the individual citizen. It cannot, in the exercise of the police power, prohibit an act which is harmless in itself, or pass an ordinance which unnecessarily or arbitrarily interferes with the right of the citizen to use the public streets.

Bill for an injunction. Gen. No. 241,462. Heard upon motion for a temporary injunction before Judge Murray F. Tuley.

The facts are stated in the opinion.

W. H. Jennings, for complainants.

Granville W. Browning, for defendant.

TULEY, J.:—

This bill is brought by complainants on behalf of themselves and others, operators of automobiles, against the city of Chicago, seeking an injunction against an ordinance of the city of Chicago, passed on the 8th day of June last, requiring all automobiles operated in the city of Chicago to display for identification, numbers and letters as provided in the ordinance, upon the ground that the ordinance is void as being beyond the power of the city under its charter.

The source of the power for the passage of the ordinance in question, if it exists, must be found in the 9th clause of the 63rd section of article V of the General Incorporation Act, under which the city is chartered, to-wit, "to regulate the use of streets" (and regulation, as here used, includes control. *Chicago Dock Co. v. Garrity*, 115 Ill. 155), or under subdivision 66 of section 62, article V of said act, which gives the power "to regulate the police of the city or village, and pass and enforce all necessary police regulations."

This latter clause was before the supreme court in the case of *MacPherson v. The Village of Chebanse*, 114 Ill. 46, where

it was insisted that it referred to the organization and regulation of the police force. The supreme court said in that case: "We think this a too narrow construction,—that the clause is not limited in its application to police officers, but may extend to and embrace a subject-matter of police regulation, under the general police power of the state."

The police power of the state is delegated to the municipality under said section 62, and the only question is whether the city has properly exercised that power, or the power regulating the streets, expressly given, by the passage of the ordinance on the 8th of June.

It is for the city council to determine when an exigency exists for the exercise of the police power, but what are the subjects of its exercise is clearly a judicial question.

The exercise of legislative discretion is not subject to review by the courts when the measures adopted are calculated to secure the public comfort, safety or welfare, but the measure so adopted must have some relation to the ends specified. *Ritchie v. People*, 155 Ill. 98.

The legislative body (in this case the city council) has no power under the guise of police regulation, to arbitrarily invade the personal rights and personal liberty of the individual citizen. It cannot, in the exercise of the police power, prohibit an act which is harmless in itself, or pass an ordinance which unnecessarily, or arbitrarily, interferes with the right of the citizen to use the public streets.

The city holds its streets in trust for the public for purposes of travel, and such use by the public is a matter of right. As our supreme court says in the case of *City of Chicago v. Collins*, 175 Ill. 445, commonly known as the "Bicycle Case:" "The right to travel being in the general public everywhere, all persons have a right to pass along and use the streets and alleys of a city in all their parts, the full width and length thereof. * * * The right of the public to use the streets is the right to use them for purposes of travel in the recognized methods in which the public highways of the state are used. Any method of travel may be adopted by individual members of the public which is an ordinary method of locomotion, or even an extraordinary method, if it is not of itself

calculated to prevent a reasonably safe use of the street by others.”

In that case a license fee was exacted as a tax for the purpose of repairing the streets. The court proceeds:

“A license, therefore, implying a privilege, cannot possibly exist with reference to something which is a right free and open to all, as is the right of the citizen to ride and drive over the streets of the city without charge and without toll, provided he does so in a reasonable manner.”

“The right of the legislative power to interdict unwholesome trades * * * and the application of steam power to propel cars,” etc., in the midst of dense masses of people, is placed by Chancellor Kent, “upon the general and rational principle that every person ought to so use his own as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.” 2 Kent, Com. 34.

Bearing those principles in mind, the question is, whether the requiring of one using an automobile in the streets of the city, to place numbers upon the same, is a valid exercise of the general police power given by the charter, in connection with the express power given to regulate the use of the streets.

There would be no question as to the right of the city to regulate the running of steam locomotives within the city upon tracks in the streets or in the streets without tracks. The reason is, first, that locomotives are dangerous to pedestrians or to other vehicles using the streets. If left unregulated by limiting the speed, requiring the ringing of bells, stopping at crossings, etc., they would seriously interfere with the reasonable enjoyment of the use of the streets by other vehicles and by pedestrians.

It is the duty of the police to see that ordinances against fast driving of vehicles on the streets are complied with. It is shown by affidavit in this case that such ordinances cannot be enforced against automobiles, because their capacity for great speed enables the drivers of them to escape with their vehicles from the pursuits of the police when an attempt is made to arrest them in the act of violating such ordinances.

That this is a common occurrence is shown, and in order to

be able to identify the vehicle and the driver, it is shown that it is necessary that the automobile be numbered with large figures so that by this means the person who is violating the ordinance against rapid driving, may be traced and identified.

It is also shown that the speed of this new vehicle, the automobile, is from fifteen to seventy-five miles an hour, and that unless the ordinance against fast driving is strictly enforced against them, they will seriously interfere with the rights of other vehicles and pedestrians to a reasonable enjoyment of their use of the streets.

It is no answer to say that other vehicles for private use are not required to be numbered. The necessity that other vehicles should be numbered does not appear to exist.

The automobile is a class unto itself and no reason can be perceived why the police power shall not be exercised as to any specific class.

That this new vehicle, the automobile, is more dangerous to pedestrians and other vehicles using the streets than any heretofore known, must be admitted, and it is a proper exercise of the police power and of the power to regulate the streets, for the city council to place them under such restrictions as will enable the police to enforce against them the penalty for exceeding the speed allowed by the city ordinances, and also as to enable the police power to enforce other restrictions, such as in regard to lights, the observance of the laws of the road by such vehicles, etc.

The requirements as to numbering would tend to do so in the opinion of the city council, and it is not for the court to say that it will not, and that it is an unreasonable restriction, or unnecessary in the proper exercise of the police power.

I do not consider the validity of the ordinance passed last year requiring an examination and license to the person desiring to operate an automobile, to be in question in this case. The validity of that ordinance is now before the appellate court in a suit that was commenced by some of these complainants.

A license, when not required as a tax, as in the bicycle case, *City v. Collins*, 175 Ill. 445, may, in my opinion, be required

to be taken out as a police regulation, if it aids in the enforcement of the police power of the city to regulate the speed of vehicles.

It is true this ordinance requires the numbers on the automobile to correspond with the number of the license issued to the owner or operator, but I cannot assume that the operator or owner of the automobile cannot obtain a license without complying with the ordinance of 1902.

Another reason why I deny the temporary injunction is, that the evidence is insufficient to prove that these machines, with such tremendous speed power, are, as alleged, of simple construction, and can be operated by any intelligent person.

I can take notice, without proof being made, that they are capable of running at great speed; that they quite often are seen upon the public streets at a standstill, incapable of moving, out of order for some reason or other, and also that accidents are quite frequent, which are charged to the reckless control of, or the inability to control, these same vehicles.

I cannot, therefore, upon affidavits stating the general conclusion as to their ease of management and simplicity of construction declare this police regulation is unreasonable or unwarranted as a means of regulating the use of the streets by those automobile vehicles.

Motion for temporary injunction is denied.

(Superior Court of Cook County. In Chancery.)

James L. Morris, by his next friend.

vs.

Roughan (Rowan).

(1899.)

INSANE PERSON—EQUITABLE JURISDICTION TO APPOINT TEMPORARY RECEIVER UNTIL APPOINTMENT OF CONSERVATOR BY PROBATE COURT. Where it appears that a person is insane and incapable of managing his property and business, *held* that a court of equity has power to appoint a temporary receiver until the probate court has appointed a conservator for him.

Bill for appointment of temporary receiver of property of insane person. Gen. No. 202,439. Heard upon affidavit and oral evidence in behalf of complainants and defendants, before Judge Farquin Q. Ball.

The facts are stated in the opinion.

C. M. Durand, for complainant.

Atwood & Pease, M. S. Bradley, and Cutting, Castle & Williams, for various parties.

BALL, J.:—

This is a bill brought by James L. Morris, by his next friend. It states that Morris is the proprietor of a large stove repairing business; that he is childless and a widower, his wife having recently died; that since July of this year he has been ill and constantly confined to his house; that he is suffering from tuberculosis, which disease has progressed so far as to impair his mind; that he is now in a state of confusional insanity, and wholly incapable of transacting or caring for his business; that while thus insane, and on August 16, 1899, he was induced by the defendant Rowan to convey certain real estate, the equity of which is worth \$15,000, to his, Morris' wife, who is the sister of the wife of Rowan; that this deed was without consideration, was never delivered to the grantee, and was by Rowan fraudulently kept from public record until after her death; that such business is being carried on by Rowan, under a pretended power of attorney, obtained by him from Morris on said August 16th, at which time the grantor was wholly insane; that Rowan has had no experience in such business and is insolvent; that the credit of the business is being impaired, and the landlord and other large creditors are threatening to collect their claims by legal process unless Rowan be removed and some competent person be placed in charge until the probate court can pass upon the petition filed in that court, for the appointment of a conservator of the insane complainant; that when such officer has qualified as such, he be substituted herein as complainant.

The application before me is for the appointment of a temporary receiver. The hearing is upon the sworn bill, upon

the evidence of certain witnesses examined in open court, and upon affidavits filed by each party hereto.

In answer to this application it is said that this court has no jurisdiction to appoint a receiver for the property of an insane person until after the proper court has appointed a conservator for him. This contention admits all the allegations of the bill which are properly pleaded. It admits waste and spoliation by Rowan, the insolvency of Rowan, and the insane condition of Morris.

Every lawyer knows, and therefore the court must be presumed to know, that some time will pass, probably a month, before the probate court can act upon the application for a conservator. In that interval, unless this court has jurisdiction, the estate of the insane person is wholly at the mercy of those having it in charge. I say "unless this court has jurisdiction," since it is provided by the constitution that the "circuit courts shall have original jurisdiction in all causes in law and equity." Sec. 12, Art. VI. And hence if this court has not the power to preserve this estate, such power nowhere exists. The law is not so impotent as to be unable to protect an estate of a person under disability from injury by another solely because the probate court has not had time to appoint a conservator for the unfortunate owner. The law does not tolerate an *interregnum*. I have no doubt of the jurisdiction of the court in this case; and I am glad to say that under the authorities it is hardly a disputable question. *Jones v. Lloyd*, 9 Moak, 792, and case there cited.

The evidence strongly preponderates that Morris is insane and is wholly incapable of transacting business. Two of the most skilled alienists in the city, after a careful examination, affirm in open court and under cross-examination that he is a victim of confusional insanity; and each of them testifies to specific facts which irresistibly support such conclusion. As to whether Rowan is wasting or mismanaging the estate, is not so clear, the affidavits upon this point being conflicting. But this is true, that the principal creditors are alarmed and unite in the request for his removal. From all the evidence before me I am inclined to the opinion that under the cir-

cumstances he is an improper person to have charge of this estate. It is better for all concerned that it temporarily be placed in the control of some competent and disinterested person.

The prayer for a receiver to act until the probate court has decided whether or not it will appoint a conservator for Morris is granted.

(Criminal Court of Cook County.)

The People of the State of Illinois

vs.

Charles Davis.

(February, 1901.)

1. **BAIL—APPLICATION FOR—AFTER VERDICT OF GUILTY.** Under the Illinois statute all persons are entitled to bail at any time before conviction, except where the offense is a capital one. *Held*, that where the defendant was indicted for receiving stolen property the verdict of a jury finding the defendant guilty was a conviction, even though a motion for a new trial was pending, and that such defendant was not entitled to be released on bail.
2. **BAIL—NATURE OF.** Bail is both a constitutional and statutory right, and the court has no discretion in the matter except to fix the amount.

Motion to admit to bail after conviction by jury of offense of receiving stolen property. Heard before Judge Jesse Holdom. Motion denied.

For statement of facts see opinion.

A. C. Barnes, assistant state's attorney for the people.

Wm. S. Forrest, for defendant.

HOLDOM, J.:—

The defendant was indicted and tried before the court and a jury on a charge of having received stolen property knowing the same to have been stolen, and a verdict of guilty returned and a motion by defendant for a new trial entered.

The cause is now before the court upon an application to admit the defendant to bail pending the disposition of the motion for a new trial.

The argument of counsel for defendant resolves itself into but one question, which is: What is a conviction within the meaning and intent of the statute on bail which provides "that all persons shall be bailable before conviction except for capital offenses where the proof is evident or presumption great."

Several illustrations in point may be gathered from our statutes. Chapter 38, Criminal Code, Div. 14, Par. 631, provides "That no person shall be imprisoned for non-payment of a fine * * * except upon conviction by jury; * * * and provided further, that when such waiver of jury is made, imprisonment may follow judgment of the court without conviction by jury."

In paragraph 634, *supra*, "Any person convicted in a court of this state having jurisdiction of any crime or misdemeanor the punishment of which is confinement in the county jail, may be sentenced by the court in which such conviction is had. * * *"

Bouvier's Law Dictionary, Rawle Edition, defines conviction as "the legal proceeding of record which ascertains the guilt of the party and upon which the sentence or judgment is founded." Citing *Nason v. Staples*, 48 Me. 123; *Commonwealth v. Lockwood*, 109 Mass. 323; *Commonwealth v. Gorham*, 99 Mass. 420.

Another definition there found is: "Finding a person guilty by verdict of a jury." Citing 1 Bishop, Criminal Law, sec. 223.

The doctrine enunciated in *Faunce v. People*, 51 Ill. 311, is not applicable either on the facts or the law to cases of bail.

The statute disqualifying a person from testifying as a witness invoked in *Faunce v. People* is but declaratory of the common law and must be construed with that fact in view. At common law conviction of certain crimes, when accompanied by judgment, disqualifies the person convicted from being a witness. Judgment must follow conviction in order

to work a disqualification for *non constat* a new trial might be awarded. It is the imprisonment following on the judgment of the court which makes the person infamous and which must concur with the conviction in order to disqualify.

Bail is a legal right about which courts have no discretion, except to fix the amount. It is both constitutional and statutory. I hold, however, that the verdict of a jury is a conviction in law and within the meaning of the statute on bail, and that in his present position the defendant is not bailable.

The motion to admit to bail is therefore denied.

(*Superior Court of Cook County. In Chancery.*)

F. S. Webster Company

vs.

Henry J. Frank and Sol. L. Lowenthal.

(April, 1903.)

1. **STREETS—OBSTRUCTIONS IN—POWER OF CITY TO AUTHORIZE.** It is not every obstruction of a street or sidewalk that is illegal. If the obstruction is authorized by the municipality and is properly constructed so as not to interfere with the public use of the street or sidewalk, it is not to be regarded as a nuisance. But it is indispensable that the street or sidewalk be left free for the public use and in as safe a condition as it would have been without such obstruction.
2. **SAME—AWNINGS OVER SIDEWALK.** Where the defendants under the authority of a city ordinance erect an awning over the sidewalk in front of their premises, and such awning does not interfere with public travel, an adjoining property owner is not entitled to an injunction restraining the maintenance of such awning.
3. **SAME—INTERFERENCE WITH VIEW.** As to any interruption of complainant's facilities of outlook in the sense of view merely, it is well settled that injunction will not lie as mere interference with prospect is not an incident of the estate, and there is no remedy in the absence of a contract.
4. **STREETS—MANNER OF USE—CITY COUNCIL MAY PRESCRIBE.** The manner of the use of the streets is for the city council to pre-

scribe, and where such city council by a general ordinance authorizes the erection of awnings over a public sidewalk no complaint can be made.

5. CITY COUNCIL—POWERS TO PASS ORDINANCE AS TO ERECTION OF AWNING. The city council under the power to "regulate the use of streets for signs, awnings, awning posts," etc., is authorized to permit the erection of awnings over sidewalks.

Bill in equity. Motion to dissolve preliminary injunction. Heard before Judge Jesse Holdom.

For statement of facts see opinion.

Dent & Whitman, for complainant.

A. W. Pulver and *F. H. Culver*, for defendants.

HOLDOM, J.:—

Complainant occupies as lessee a store, No. 139 Madison street, with a basement thereunder, and a like basement under the adjoining number, 141. The business there conducted is dealing in typewriters, and in the store the typewriting machines are displayed with artistic lettering on the store windows calculated to attract the attention of passers-by and of sufficient conspicuousness in size as to be viewable for some distance on Madison street which in this particular vicinity is unobstructed in both directions. Defendants operate a theatre east of and adjoining the store of complainant, and it is averred have commenced to construct in front of their theatre a permanent awning of durable material to extend from their front wall at or about the top of the first story of the building to or near the edge of the sidewalk; that complainant is entitled to the undisturbed enjoyment of the air and light upon Madison street in the use of its premises; that the construction of the awning by the defendant will abridge such light and injure its business and work irreparable injury; and further charging "that such awning is one which could not be properly licensed or authorized by the city of Chicago, and if defendants have obtained any such license the same is void. That defendants on or about September 12, 1902, procured to be issued by the commissioner of buildings of the city of Chicago a license or permit to construct an iron and glass can-

opy at number 137 Madison street to be upon same plan exhibited by defendants and is the structure complained of.”

A temporary injunction has been granted and the cause is now before the court on a motion to dissolve the injunction on the hearing of which affidavits *pro* and *con* were read in evidence in support respectively of the bill and answer now on file.

It is not disputed that defendants claim to act in the construction of such awning under power of a general ordinance of the city of Chicago in relation to awnings, being Sec. 1824 of the Revised Ordinances of 1897, viz.:

“Fixed awnings may be constructed over sidewalks, as protection to the entrances of buildings, provided such awnings are constructed of a metal framework, filled with glass, not less than three-quarters of an inch thick, and supported entirely from the structure of the building and without posts or other obstructions upon the sidewalk. Such awnings shall be of the width of the entrances which they protect and shall extend over the entire width of the sidewalk in front of the same. The lowest part of the awning shall be at least ten feet above the sidewalk level. Any person who shall erect any awning contrary to the provisions hereof or refuse or neglect to forthwith remove any awning or awning-post heretofore or hereafter erected contrary to the provision hereof, shall be subject to a penalty of five dollars for every offense and to a further penalty of five dollars for every day he shall fail to comply therewith, after written notice from the commissioner of buildings to remove the same.”

That thereunder plans for the proposed awning were submitted to and approved by the commissioner of public works and a permit for its erection granted—but complainant contends that the city council had no power to pass any such ordinance nor any power to grant to any person the right to do anything the natural result of which would be to curtail the air, light or prospect to complainant’s store.

In support of this contention the principles of law announced in *Field v. Barling*, 149 Ill. 556; *Hibbard v. Chicago*, 173 Ill. 91; *People ex rel. v. City of Chicago and Marshall*

Field, 193 Ill. 543 (in which latter case this court is referred to the reason and the law stated in the dissenting opinion by Mr. Justice Magruder, the only member of the court who does not concur in the opinion filed in the case); *McGann v. The People*, 194 Ill. 526, and other cases are urged as applicable and decisive of the complainant's right to have the injunction continued in force.

In the *Field* case the common council by resolution attempted to grant the right to Field to construct across Holden Place a three story bridge to connect the old with the new building of Field then in process of construction. Holden Place was a public street, forty feet wide, platted as such in the original subdivision by the Federal government. The complainant owned property abutting on this street to the north of this proposed structure and claimed that its construction would materially damage his property as to access, light, air, rental and salable value, and it was held that the city holding the streets as it does in trust for the public use, had no right to permit any use or diversion from public to private interests; that the right attempted to be granted by the permit was a special privilege to a private person in public property and was therefore within the constitutional inhibition and void.

In the *Hibbard* case the offending awning was constructed and maintained under a special license and permit in violation of an existing general ordinance governing and regulating the erection and maintaining of awnings. The council revoked the permit and ordered the awning taken down. *Hibbard* sought to thwart the action of the city in this regard by injunction. The manner of the construction of this awning made it an encroachment and an obstruction upon the street. It was in fact as well as in law a purpresture. It was held that the mere consent of the city council by resolution or order gives no vested right.

The case at bar differs materially upon principle to the cases cited by counsel for complainant. The right in the latter cases was claimed not under a general ordinance applicable alike to all, but as a special privilege by resolution of the

council; rights claimed thereunder could be terminated at any time at the pleasure of the council.

The principal question to be primarily determined is whether or not the ordinance, *supra*, under which defendants are claiming the right to erect the awning which is sought to be restrained in this cause, is within the power of the city council to enact. Subdivision 17, sec. 1, art. V, title, "Cities and Villages," confers among other powers on the city council to "regulate the use of streets for signs, awnings, awning posts," etc.

Is sec. 18 of revised ordinances of 1897 in excess of the power there granted or subject to criticism as being obnoxious to constitutional limitation?

The supreme court has not judicially interpreted this section of the ordinance relating to awnings. The nearest case in point is *Smith v. McDowell*, 148 Ill. 51, which by analogy is decisive of the case at bar. The court said on page 65: "It by no means follows that every obstruction of a street is a purpresture or illegal. Thus the necessary and temporary obstruction incident to the use or repair of a street, * * * excavations under the street authorized by the municipality and the like (*Gridley v. Bloomington*, 68 Ill. 47) if temporary and reasonably necessary must be borne, as a reasonable and necessary limitation of the free and uninterrupted right of use by the public. * * * And so in respect of iron gratings to admit light, openings for admission for coal, flap or trap doors, the extension of signs into the street, and the like, if authorized by the municipality, and properly constructed, so as not to interfere with the public use of the street or sidewalk are not to be regarded as nuisances. But it is indispensable, to take from the use of the street for such purposes the character of a nuisance that the street or sidewalk be left free for the public use, and in as safe condition as it would have been without such use. * * *"

The structure proposed by the defendants will in no manner affect the use by the public of the sidewalk in front of either the premises of complainant or defendants; the bill

charges that it is to be erected at the top of the first story of the building and to be extended to a point over the edge of the sidewalk, precluding any possibility of its interfering with public travel in any manner; it can not physically interfere with the premises of complainant (it occupying the store or first floor and basement); the awning it is admitted is intended to be constructed of iron and glass to the east and above the store of complainant and it can not to any materially appreciable extent interfere with either light or air.

In *Garrett v. Janes*, 65 Md. 260, 3 Atl. 597, the court said on page 271: "As to any interruption of the plaintiffs' facilities of outlook in the sense of view merely, it has been long ago decided that for mere interference with prospect, it not being an incident of the estate, no remedy lies apart from contract. *Aldred's Case*, 9 Coke 59; *Butt v. Imperial Gas Co.*, L. R. 2 Ch. App. 158.

The manner of the use of the streets is for the city council to prescribe and they must be the judge of the necessities of condition and environment—they may ornament the streets in such artistic fashion as they may see fit—erection of monuments or drinking fountains would be within their discretion—such are considered in some urban communities desirable. The modern awning is to be found in all cities of any considerable importance as to population, wealth and artistic refinement, and is in these modern times looked upon as a public utility in places to which the public resort in large numbers, such as theatres, hotels, museums, art galleries, churches, etc., and have come to be regarded as a public necessity. When erected in public places, an awning can not be regarded as being for private use, but for the public benefit.

Conceding however, the contention of counsel for complainant as to the correctness of his position on the law of the case we find no facts warranting the application of his legal principles. It must be conceded that there is no obstruction of the public highway possible by the erection of the proposed awning, no interference with the unobstructed use of the street by the public. It can not be contended that there is any obstruction of air of any moment and if there be an impairment

of light it is so slight as to be practically inconsequential, it is *damnum absque injuria*. The last point is the alleged interruption or limitation of view which it is claimed will result from the erection of the proposed awning; as we have already seen no right to outlook or view exists, save by contract. *Garret v. Janes, supra*. It therefore follows that the city ordinance, *supra*, is valid as being within the authority conferred by the City and Village Act, *supra*. This being my conclusion, it follows that complainant is not entitled to maintain the injunction prayed in its bill and preliminarily granted herein and it will therefore be dissolved.

(Superior Court of Cook County.)

People ex rel. Sontag

vs.

W. D. Kruse.

(Nov. 21, 1899.)

1. "FLAG LAW" UNCONSTITUTIONAL. The Illinois statute known as the "Flag Law" prohibiting the use of the national flag for advertising purposes is in derogation of the constitution and void as not being within the police power of the legislature and coming within the category of laws known as class legislation.
2. SAME. Relator, agent of the Anheuser-Busch Brewing Ass'n, was arrested for selling beer contained in bottles and barrels upon which appeared the trade mark of the Brewing Ass'n, consisting of a device in which stars and stripes appeared on a shield in connection with an eagle, alleged to be in violation of the Illinois flag law prohibiting the use of the national flag or emblem for advertising purposes. Upon *habeas corpus*, held that the law was unconstitutional and that relator should be discharged from arrest.

Habeas corpus. Superior court of Cook county. Gen. No. 202,274. Heard before Judges Holdom, Brentano and Stein, sitting *en banc*.

The facts are stated in the opinion.

C. H. Aldrich, attorney for plaintiff.

HOLDOM, J.:—

This *habeas corpus* proceeding brings up for consideration and determination the constitutionality of the so-called "Flag Law Statute," being an act passed by the legislature of the state and approved by the governor April 22, 1899, containing five sections and entitled "An act to prohibit the use of the national flag or emblem for any commercial purposes or as an advertising medium."¹

¹ The Illinois statute in question is as follows:

"An act to prohibit the use of the national flag or emblem for any commercial purposes or as an advertising medium.

Section 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly: That it shall be unlawful for any person, firm, organization or corporation to use or display the national flag or emblem, or any drawing, lithograph, engraving, daguerreotype, photograph or likeness of the national flag or emblem, as a medium for advertising any goods, wares, merchandise, publication, public entertainment of any character or for any other purpose intended to promote the interests of such person, firm, corporation or organization.

Section 2. Nothing in this act shall be construed as affecting either public or private exhibitions of art, or shall in any way restrict the use of the national flag or emblem for patriotic purposes.

Section 3. All prosecutions under the provisions of this act shall be brought by any person or persons violating any of the provisions of this act, before any justice of the peace of the county in which such violation is alleged to have taken place, or before any court of competent jurisdiction; and it is hereby made the duty of the state's attorney to see that the provisions of this act are enforced in their respective counties, and they shall prosecute all offenders on receiving information of the violation of any of the provisions of this act; and it is made the duty of the sheriffs, deputy sheriffs, constables and police officers to inform against and prosecute all persons whom there is probable cause to believe are guilty of violating the provisions of this act; one-half of the amount recovered in any penal action under the provisions of this act shall be paid to the person filing the complaint in such action, and the remaining one-half to the school fund of the county in which the said conviction is obtained.

Section 4. All prosecutions under this act shall be commenced within six months from the time such offense was committed, and not afterwards.

Section 5. Any persons violating the provisions of this act shall

Relator was arrested on five warrants issued by O. H. McConoughey, a Cook county justice of the peace, for alleged violations of this act. Relator is the agent at Chicago of the Anheuser-Busch Brewing Association, a Missouri corporation, with its brewery and principal office at the city of St. Louis in said state. The trade mark of said brewing company appearing on bottles and barrels of beer vended at Chicago by the relator consisting of a device in which stars and stripes appear on a shield in conjunction with an eagle alleged to be the national emblem, is the *gravamen* of the offense which is claimed to be a violation of the act for which the arrests were made, to free himself from which relator has sued out the writ of *habeas corpus* in this case. The trade mark which it is claimed is violative of the statute has been registered as such in the patent office of the United States and so certified by the commissioner of patents in pursuance of the act of Congress regulating the registration of "trade marks."

No Federal statute except that establishing the national flag and comprised in sections 1791 and 1792, Revised Statutes United States, and providing also for the addition of a star for each new state admitted into the union, has ever been passed; and as the act of the Illinois legislature now in question does not in any manner conflict with or contravene the Federal statute, and as there is nothing in the organic law of the state or nation limiting in any manner state control of the flag, it follows that the legislature of Illinois has as much power and right to enact laws in relation to the national flag as congress itself. If, therefore, the act in question is unconstitutional it is for some inherent infirmity which would make it equally so, were it an act of the Federal congress.

There is no force in the contention that the act is repug-

be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than \$10.00 nor more than \$100.00 and costs, and in default of payment of said fine and costs imposed shall be imprisoned in the county jail at the rate of one day for each dollar of fine and costs imposed.

Approved April 22, 1899.

(Laws of Illinois, 1899, page 234.)

nant to the commerce clause of the constitution. The fallacy of the argument lies in the assumption that a "trade mark" is in effect a component part of an article of commerce because it is a medium of sale; while in fact it is the goods, of which the trade mark is no integral part, which constitutes the commercial article. The registration of a trade mark under the act of congress providing for such registration grants unto the party registering it, protection against its infringement by others, and nothing more.

It is contended upon the part of the state that the enactment of the "Flag Law Statute," is an exercise of the police power of the legislature, and it is urged with much earnestness and confidence that the statute rests for its support upon that fundamental principle. What constitutes the police power is a question of law to be determined by the court. *Eden v. The People*, 161 Ill. 296; *Lake View v. Rose Hill Cemetery*, 70 Ill. 191. Is the use of the national flag or emblem for commercial purposes or as an advertising medium a subject for police regulation? If it is, it must be upon the theory that such regulation is conducive to the health, morals, peace or security of the property rights of the people of the state.

The supreme court of the United States said in *Mugler v. Kansas*, 123 U. S. 623, on page 661, "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to these subjects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution."

How can the national flag or emblem upon a beer bottle or barrel, as in the case at bar, affect the public health or morals or the public safety? The national flag, wherever found, stands for our highest ideals of a free government, a free people, with free and enlightened institutions; it stands for valor, for patriotism; it is the standard under whose fold the citizen goes to war and sheds his life's blood for his country's honor and protection. By an act of the legislature passed in 1897,

the national flag was directed to be unfurled over public schools and public institutions, prescribing penalties for its violation.

If the act, therefore, rests upon the police power, it must fail unless it can be so construed as to be an act prohibiting that which is hurtful to the comfort, safety or welfare of the people of the state. A construction strained without reason and unnatural—the laws of interpretation applicable to like cases inhibit such a conclusion.

Does the exemption from the operation of the act, which in section 2 provides that “Nothing in this act shall be construed as affecting either public or private exhibitions of art,” constitute such a discrimination in favor of a particular class as to make the act come within that coterie of laws denominated class legislation? By section 2 of this act public and private exhibitions of art are excluded from its operation—that is plain. It might be contended that public exhibitions of art were for the benefit of and belonging to the people, and therefore it was an exemption which was not either in reality or effect a discrimination against or in favor of any particular class; and while such a contention is tenable it can not be so claimed as to “private exhibitions of art.” It will be assumed that private exhibitions are for the benefit and profit of the individuals owning the exhibition. There is no limit as to what may be so exhibited and no definition of how the flag or emblem shall be used in these “private exhibitions of art.” Such an exhibition might contain artistic representations of the various unique devices, by which, anterior to July 1, 1899, merchants and traders were wont to designate their several articles of merchandise by using in numberless ways the national flag or emblem. Such private exhibitions would naturally be for profit and thereby the privileged class contemplated by section 2 would be authorized to do just what another and different class are prohibited from doing by section 1 of that act.

Locke, in his treatise on Civil Government, says: “Those who make the laws are to govern by promulgated established

laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough." Cooley, Constitutional Limitations, 484; *Strauder v. W. Va.*, 100 U. S. 303. This view of the law was upheld in *Ritchie v. The People*, 155 Ill. 98. The Ritchie case is commonly known as the *Sweat Shop Case*. It was enacted for the regulation of a particular and designated class of workers, and was held to be repugnant to the constitution and void. The court said: "We are inclined to regard the act as one which is partial and discriminating in its character. If it be construed as applying only to manufacturers of clothing, wearing apparel and articles of a similar nature, we can see no reasonable ground from prohibiting such manufacturers and their employes from contracting for more than eight hours of work in one day, while other manufacturers and their employes are not forbidden to so contract. If the act be construed as applying to manufacturers of all kinds of products there is no good reason why the prohibition should be directed against manufacturers and their employes and not against merchants or builders or contractors or carriers or farmers or persons engaged in other branches of industry and their employes therein. Women employed by manufacturers are forbidden by section 5 to make contracts to labor longer than eight hours in a day, while women employed as saleswomen in stores or as domestic servants, or as bookkeepers or stenographers, or typewriters, or in laundries, or other occupations not embraced under the head of manufacturing, are at liberty to contract for as many hours of labor in a day as they choose. The manner in which the section thus discriminates against one class of employers and employes and in favor of all others, places it in opposition to the constitutional guaranties hereinbefore discussed and so renders it invalid."

The principles enunciated in this last case are fully sustained in the still later case of *Harding v. The People*, 160 Ill. 459. Reasoning analogous to the foregoing may be found in *In re Grice*, 79 Fed. 627, and *In re Garrabad*, 84 Wis. 585, 19 L. R. A. 858. We are of the opinion that the statute in

question is in derogation of the constitution and void as not being within the police power of the legislature and coming within the category of laws known as class legislation

The relator will therefore be discharged.

From this opinion Judge Stein dissents, except upon the questions arising under the commerce clause of the Federal constitution and the right of the state to legislate in relation to the national flag.

NOTE.

Validity of laws prohibiting the use of the United States flag for advertising purposes.

In *Ruhstrat v. People*, 185 Ill. 133 (1900) the Illinois Act of 1899, known as the "Flag Law" prohibiting under penalty the use of the national flag or emblem for advertising purposes, was held unconstitutional as an arbitrary invasion of the personal rights and liberties of a citizen.

In *People ex rel. v. Van de Carr*, 178 N. Y. 425, 70 N. E. 965 (1904) a similar law was declared unconstitutional, the court relying upon the decision in *Ruhstrat v. People*, 185 Ill. 133.

But in *Halter v. State*, 105 N. W. 298 (Neb. Oct. 1905) a "Flag Law" prohibiting the use of the national flag or emblem for advertising purposes was upheld as constitutional, the court expressly disapproving and refusing to follow the decision of the Illinois supreme court in *Ruhstrat v. People*, 185 Ill. 133 (1900).

(Circuit Court of Cook County.)

People of the State of Illinois ex rel. Greeley

vs.

William B. Porter, et al.

(March 28, 1899.)

1. PETITION FOR LEAVE TO FILE AN INFORMATION IN THE NATURE OF QUO WARRANTO—PRACTICE, WHERE STATE'S ATTORNEY REFUSES TO ALLOW THE USE OF HIS NAME IN PRESENTING THE PETITION. Where under the statute of *quo warranto* it is provided that a petition for leave to file an information in the nature of a *quo warranto* in the name of the people may be filed by the

state's attorney of his own accord or at the instance of an individual relator, and the state's attorney refuses to allow the use of his name in presenting such petition, *held* that so far as the private rights of the relator are concerned, the use of the name of the state's attorney is a mere matter of form, a mere fiction which has come down from the English law, and that the proceeding should be dismissed so far as the rights of the people are concerned, but retaining the jurisdiction so far as the rights of the relators are concerned.

2. QUO WARRANTO PROPER REMEDY TO TEST LEGALITY OF SCHOOL DISTRICT. *Quo warranto* is the proper proceeding to test the legality of a school district and the right of the alleged board of education thereof to levy taxes.

Petition for *quo warranto*, Circuit Court, Cook County. Gen. No. 193,133. Heard before Judge Murray F. Tuley.

For statement of facts see opinion.

L. M. Greely, attorney for petitioner.

W. F. Struckman, attorney for certain defendants.

TULEY, J.—

The petition in this case is under the statute of *quo warranto*, chapter 112, which provides that the attorney-general or the state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction for leave to file an information in the nature of a *quo warranto* in the name of the people, in such court, and if such court shall be satisfied that there is probable ground for the proceeding, the court may grant the petition and order the information filed.

The petition was filed with a direction to the relators to notify the state's attorney that he show cause why the court should not order the information filed as prayed for, it having been suggested to the court that application had been made to the state's attorney for the use of his name in presenting the petition and that he had refused to permit such use of his name.

The relators are taxpayers who seek relief, among other things, against the attempted levy of taxes by the alleged

board of education of the said joint high school district. There can be no question but that the proceeding by *quo warranto*, where it is sought to call in question, as in this case, the right of officials to levy taxes and thereby injure the private property of relators, is in fact a civil proceeding, although in form criminal, and that the proceeding by *quo warranto* is the proper proceeding to test the legality of the school district referred to and the right of the alleged board to levy taxes therefor.

The supreme court has decided that a taxpayer cannot raise the question as to the illegality of the school district and obtain relief by injunction in a court of equity, nor can he make that defense upon application for a judgment for taxes levied by authority of a *de facto* board exercising the taxing powers for the district; that his only remedy is by proceeding by *quo warranto*. *Renwick v. Hall*, 84 Ill. 162; *Keigwin v. Drainage Commissioners*, 115 Ill. 347; *Trumbo v. People*, 75 Ill. 561.

The refusal of the state's attorney to present the petition or allow his name to be used in connection therewith raises the question, whether or not the court has the power to grant the petitioner leave to file the petition on the information notwithstanding the objection of the state's attorney.

This question has never been decided in this state, and this is the first case in my long experience on the bench in which any state's attorney ever refused to permit the use of his name in a *quo warranto* proceeding to an individual seeking, as relator, to redress, or prevent, a private injury.

The state's attorney showed cause why he refused to file the petition or allow the use of his name in connection therewith, and moves to set aside the order allowing the petition to be filed and to dismiss the same. The cause shown by the state's attorney in substance is, that he has examined the relator's complaint as to the illegality of the high school district organization and became satisfied that the public interest did not require any attack upon the validity of the high school district, and that petitioner's objection to the legality of the proceedings organizing the district, were technical and without merit; also that in the discharge of his duty as state's attor-

ney and in the exercise of the prerogative of his office, he had refused to file the petition, or to give leave for the use of his name in the proceedings.

There appears to be no reason to question the good faith of the state's attorney in his refusal, but his contention that as state's attorney he must determine for himself and is accountable to no judge or court for his decision whether he will institute or discontinue proceedings wherein the people have an interest, cannot be sustained. If it could be, this petitioner, appealing to a court of justice for relief against taxes assumed to be levied by persons assuming legal powers, finds the state's attorney barring his way and refusing him entrance to the court. If he can do this in one case, he can do it in any and can keep any person in office whom he may desire, without regard to whether such person is legally entitled to the office or not.

It is not a question of the good faith of the state's attorney, and if his position is correct, it is immaterial whether he acts in good faith or bad faith. He contends it is for him and not for the court to decide whether this relator shall have his petition for redress entertained by the court or not.

The state's attorney is an officer of the court and neither he nor any other officer of the court, when it relates to the individual rights of suitors, shall be heard to say that he has more power than the court itself. He does not carry the key of the court room in his pocket to admit whomsoever he pleases. The law requires a relator in a case like this at bar to give security for costs. The relator alleges he has employed his own attorney to attend to the case and he only asks the nominal use of the name of the state's attorney.

It is true that the statute provides that the state's attorney or attorney-general may present, at the instance of a private relator, a petition for leave to file an information in the name of the people. But so far as the private rights of the relator are concerned, the use of the name of the state's attorney or attorney-general is a mere matter of form, a mere fiction which has come down to us from the English law, and is of no more use in determining the rights of the relator, or of other parties

interested, than had the use of the names of John Doe and Richard Roe in the old form of the action of ejectment.

I am of the opinion that as a matter of right the relator had a right to present this petition to the court and that it is a matter of sound judicial discretion, whether the leave to file the information should be granted or not.

Spelling, Extraordinary Relief, sec. 1867, after reviewing the different decisions, says: "In Wisconsin, Iowa, and probably other states, the discretionary control of the court over the proceedings continues throughout the proceeding, and the information may be dismissed at any stage, the practice being analagous to that under the statute 9th of Ann, under which the matter is at all times under the control of the court." Our statute of 1845 was substantially that of the 9th of Ann. *People v. Ridgley*, 21 Ill. 64; and *People v. Waite*, 70 Ill. 25.

The present revised statute of 1871, while the more comprehensive and sweeping in some respects, is substantially like that of 1845, so far as the rights of a private relator are concerned. Under the English decisions the 9th of Ann was held "to let in every person who desired it to make use of the king's name in actions of *quo warranto*, and that the act did not leave it to the discretion of the crown officers but put it in the discretion of the court. Cole, Criminal Information, p. 125, and cases cited bearing on the same question. See *Commonwealth v. Swank*, 79 Pa. St. 154. The taxpayer was held entitled to the writ to test the election of members of a board of assessment. *State v. Hammer*, 42 N. J. Law 435.

Our own supreme court draws a distinction between a proceeding in *quo warranto* to enforce public rights and one to enforce private rights, and although there are no decisions directly in so many words that declare a relator has a right to the writ without the consent of the state's attorney, or without the use of the name of the state's attorney, it is fairly inferable from the decisions that such right does exist. *People v. Boyd*, 132 Ill. 60; *People v. North Chicago Railway Company*, 88 Ill. 537; *People v. Bruennemer*, 168 Ill. 482. In the latter case, which was a *quo warranto* proceeding to declare the illegality of a high school district, the court held that the action

of *quo warranto* is a purely civil one, citing *People v. Shaw*, 13 Ill. 581; *Ensminger v. People*, 47 Ill. 384, and *People v. Boyd*, 132 Ill. 60.

It is contended, however, by the state's attorney that the public interests, as well as private interests, are involved in this litigation. In the state of Wisconsin, *Attorney-General v. Barstow*, 4 Wis. 567, a similar question arose, and the court there held, on a motion by the attorney-general to dismiss the proceeding, that the proceeding would be dismissed so far as the rights of the people were concerned, but would be retained so far as necessary to give relief to the relator in his individual right.

I am satisfied that this court has jurisdiction to give the relator the relief prayed for, assuming the facts in the petition to be true, even though in granting that relief the interest of the public might be directly or indirectly affected, and that the court can do this notwithstanding the objection of the state's attorney.

An order may be drawn dismissing the proceeding so far as the rights of the people are concerned, but retaining the jurisdiction, so far as the private rights of the relators are concerned. The order may provide for the filing of the information in the name of the people by the state's attorney on the relation of the relators, or without using the name of the state's attorney as may be desired, the order to be drawn in accordance with the views expressed, and a copy thereof to be submitted to the members of the board and the state's attorney before presenting the same for entry.

This method of proceeding may produce some complications, but I have no doubt of the power of the court to adjudicate at the suit of the relators as to the right of Porter and the other defendants to act as members of the alleged board of education and to certify taxes to be collected from relators' property. If the interests of the people suffer thereby, it may be because the state's attorney refuses to have the people represented in the case.

(Circuit Court of Cook County. In Chancery.)

The Public Grain and Stock Exchange

vs.

**The Western Union Telegraph Company and Board of Trade,
et al.**

The Public Grain and Stock Exchange

vs.

Baltimore and Ohio Telegraph Company, et al.

(1883.)

1. **MONOPOLIES—DESTRUCTION OF COMPETITION.** Neither the establishing of monopolies nor the destruction of competition are looked upon with favor by the courts.
2. **TELEGRAPH COMPANIES FURNISHING MARKET QUOTATIONS—WHETHER AFFECTED WITH A PUBLIC USE.** Where a telegraph company as incident to its regular telegraph business procures market quotations on the board of trade and circulates such quotations over "tickers," such incidental business is affected with a public use, and the quotations must be furnished to all alike without discrimination.
3. **SAME—BUCKET SHOPS—EQUITABLE AID.** Where the complainant seeks to compel the defendant to furnish it market quotations and it is made to appear that such quotations are desired for the purpose of conducting a "bucket shop" or any other illegal business, a court of equity will not lend its aid for any such purpose. But before relief is denied there must be proof of such fact and not mere suspicion.
4. **BOARD OF TRADE—RULES OF.** Neither the courts nor the legislature can interfere with the actions of the board of trade as to the control of its own floor or the discipline of its members, but the business transacted upon the floor of the board of trade is "affected with a public interest" to an extent which would authorize the legislature or the courts to prohibit such board from exercising any discrimination as to who shall receive its market quotations, or as to what telegraphic companies shall be allowed facilities for distributing the information to the public.
5. **RIGHT TO RECEIVE MARKET QUOTATIONS—ORDER OF THIRD PERSONS NO EXCUSE.** Where a telegraph company receives market quotations from the board of trade and the public are entitled to receive such quotations without discrimination, the court will compel the furnishing of such quotations to complainant even

though the board of trade, having power to dictate to the telegraph company, has instructed such telegraph company not to furnish the quotations to complainant. If the telegraph company obtains the quotations from any source and sends them to others they must send them to all.

6. **COMMON CARRIERS—DUTY TO SERVE ALL—CONTRACT WITH THIRD PERSON NO EXCUSE.** A common carrier cannot refuse to carry for one person because another person does not desire him to, or because the carrier is under contract not to do so.
7. **PUBLIC USE—WHEN PROPERTY BECOMES AFFECTED WITH.** Property becomes affected with a public interest and subject to control for the common good when used in a manner to make it a public consequence and affect the community at large.
8. **COMMON CARRIERS—ORIGIN OF DUTY OF.** The liabilities of common carriers were originally determined by the usages of trade, and the opinions of the judges predicated upon the obligations they assumed, and the nature of their business.
9. **COMMON LAW—PRINCIPLES OF.** The public welfare is the great and final test in matters at common law.
10. **EQUITY—EXPANSION OF DOCTRINES OF.** The system of equity is so constructed upon comprehensive and fruitful principles that it possesses an inherent capacity of expansion so as to keep abreast of each succeeding age and generation.
11. **PUBLIC SERVICE CORPORATIONS—DISCRIMINATION—REMEDY AGAINST.** Where a public service corporation discriminates in its dealings with the public there is no remedy at law, and a court of equity will exercise jurisdiction and issue a mandatory injunction to prevent such discriminations.

Motion to dissolve injunction in two cases. Gen. No. 43,416 and Gen. No. 43,415. Heard respectively before Judge Murray F. Tuley and Judge Thomas A. Moran.

For statement of facts see opinion.

A. B. Jenks, solicitor for complainants; *Leonard Swett*, *Lyman Trumbull* and *W. C. Goudy* of counsel.

Williams & Thompson, solicitors for Western Union Telegraph Co. *C. C. Clarke*, solicitor for B. & O. Telegraph Co. *C. Beckwith* and *A. B. Wilson*, solicitors for Board of Trade of the City of Chicago.

Opinion in First Case.

TULEY, J.:—

This bill is filed by the complainant to restrain the defendant telegraph companies from removing from its place of busi-

ness three "tickers," and two Morse instruments placed there by the defendant companies, and to restrain them from cutting off and withdrawing from the complainant at their place of business information as to the market value of grain, provisions, stocks and other merchandise, upon the ground that the telegraph companies are the servants of the public, and under a duty by law which forbids them so acting.

It appears that the Western Union Telegraph Company obtained from the other defendant the right to use the "tickers" and placed the instruments in question in complainants' "place of business." The "tickers" are used for printing automatically upon a slip of paper the quotations of the market of the board of trade of Chicago and other centres of exchange, and the arrangement is such that the printing is exhibited to all the offices and places of business containing such instruments, at the same instant of time.

In this city a circuit is made from the board of trade, with the wires of which circuit the "tickers" and Morse instruments are both connected, so that all persons having such instruments may secure the quotations at the same moment.

The Western Union Company has a department of its business in operation for several years past known as "the Commercial News Dispatch Department." It has its agents upon the floor of the board of trade of this city, and of other exchanges at all the large commercial centers of trade throughout the country, and collects information as to the state of and fluctuations of the market at the different centres. This it transmits from one centre to the other, and to all the persons having such instruments in their places of business, so that, for example, in the city of Chicago, all such persons on the line of the circuit receive not only the quotations of the foreign markets, but also the quotations showing the fluctuations—at the instant they occur—of the market on the board of trade of Chicago, New York, Philadelphia, and the other large business centres of the United States. This business has been built up by the telegraph company as its answer alleges, "as an incidental branch of its regular telegraph business."

The telegraph company insists that this "commercial news

dispatch business," is private business of the company; that it is *ultra vires* its powers as a corporation, and therefore that it can furnish this commercial news and these instruments to, and withhold the same from any person it pleases. That as to that business it is not under the same obligation; as it is,—in its relation to the public, in regard to what it terms its regular business, to-wit, to treat all persons offering to do business with it alike, and without discrimination. If this position is a tenable one, it is fatal to complainants' case.

It is true that when telegraphy was first introduced, and when the Western Union Telegraph Company was chartered, its business was confined to sending messages over its wires, but since then great and wonderful changes in the methods of transacting commercial business have taken place, and no instrumentality has been so potential in bringing about these changes as the telegraph.

As said by Chief Justice Waite, in 1877, in the case of *Pensacola Telegraph Company v. Western Telegraph Company*, 96 U. S. 1: "The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business and become one of the necessities of commerce: it is indispensable as a means of inter-communication, but especially so in commercial transactions. The statistics of the business before the recent reduction in rates showed that more than eighty per cent. of all the messages sent by telegraph related to commerce. Goods are sold and money paid up on telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcements of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information."

The fact that such a large per cent. of all messages relate to commerce, may have suggested to the telegraph company that it might supply this demand for information as to the state of market to its own profit, and the convenience of the public by establishing in connection with its other business this commercial news department. Whatever may have been the in-

ducement it did establish that branch of business, and for years past it has been gathering the market quotations at all the large commercial centres, and transmitting them to its patrons at all such centres; so that we find its "tickers" and Morse instruments in hotels, banks, commission merchants' and brokers' offices, billiard and bar rooms, everywhere, in fact, that the interests of the public seems to require them, either as a convenience or a necessity. The parties who use this news and these instruments, and they form a very large number of the persons engaged in trade, "choose a subtle fluid for their agent, and by quickness and accuracy beat down competition." The value of the information which they demand depends upon the time, the day or the hour or minute, perhaps, that they may receive it.

The telegraph company admits that it has been furnishing complainant with these market quotations; that it is about to discontinue the same and remove the "tickers" and Morse instruments from complainant's place of business, and alleges as a reason for its contemplated action that it obtains its quotations or news as to the Chicago market by means of agents on the floor of the Chicago board of trade; that it has been notified by the managers of the board of trade that if it does not discontinue sending market quotations to what are known as "bucket-shops," its agents will be prohibited access to the floor of the board, and not allowed to collect any market quotations or other commercial news; and that complainant carries on a "bucket-shop," which is a place used for gambling upon the future prices of grain and other commodities.

If the complainant has a right to these market quotations, it is no concern of the telegraph company or of the board of trade as to what use it makes thereof, but a court of equity—whether the fact is set up as a defense or not—when it is made to appear that a complainant is seeking its aid to protect an immoral business like gambling, or a business prohibited by law, will not lend its assistance for any such purpose, but will dismiss the complainant's bill, and leave him to his remedy at law, if any he has. In this case, however, there is no proof that the complainant is engaged in any other than a legitimate

business. The only evidence tending at all in that direction being that "bucket-shops" always "take the deal" or trade, and that this complainant does the same, but this is neither more nor less than every member of the board does in every case where as broker he buys or sells on the floor of the board.

The board of trade does not profess to be engaged in a moral reform movement, nor is its action aimed solely at the "bucket-shops," as the preamble to this resolution passed by its managers shows its grievance to be that "Market quotations—to the injury of our members,—are furnished parties no way contributing to the support of the board." It is competition—not immorality, which the board of trade is seeking to put down.

It is evident that if the managers can dictate that the quotations shall not be furnished this complainant, they may cut off from receiving the same, every merchant, commission-house, broker, banker, or other persons outside the board; and might, if they thought proper, dictate that only one man in New York, say Jay Gould or Keene should be permitted to receive them by telegraph.

In such case there would be but little difficulty in obtaining a monopoly in the dealing in and brokerage of grain and other commodities.

What forestalling of the market might take place, and what gigantic monopolies might be built up in commercial centres, where values are determined by the ruling prices on the Chicago board of trade.

Neither the establishing of monopolies nor the destroying of competition is looked upon with favor by the courts.

The corporation known as the Chicago board of trade was organized more than a quarter of a century ago by a few merchants of this city for their own convenience in the transaction of their business. By reason of the wonderful development of the country tributary to Chicago as a commercial centre, the business done upon the floor of this board of trade has become a great and controlling factor in fixing the prices or value of grain, meats and other commodities, not only throughout the United States, but to some extent in Europe.

Millions upon millions of property, consisting principally of wheat, corn and meats—the common necessities of life, are affected in value daily and hourly by the transactions had upon the floor of this board of trade. So widely extended and important has the influence of the business there transacted been upon the price of grain and provisions; so much is the public interested in knowing and in ascertaining the results from hour to hour of that business, that I cannot bring my mind to the conviction that this business, and these market quotations—if they are the property of the board—are not “affected with a public interest,” whereby they cease to be private property only, within the principles so clearly and forcibly laid down in the *Munn and Scott warehouse case, ante*.

This market on the floor of the Board of Trade stands in “the gateway of commerce.” The members on the floor of the board of trade take “toll” by way of commission upon four-fifths of the wheat and other products of the great northwest—an empire in itself. These products—such is the course of trade—must, whether the owners desire it or not, pass through this board of trade market. A membership of the board, which confers the privilege of participating in the taking of this “toll,” is worth \$10,000. It can make no difference in principle whether this “toll” is taken by the corporation or by the members; the result to the public is the same.

It may be true that neither the courts nor the legislature can interfere with its control of its own floor, or with the right of the board to discipline its members. But I am clearly of the opinion that the business transacted upon the floor of the board of trade is “affected with a public interest,” to an extent which would authorize the legislature, and the courts in the absence of legislation, to prohibit the board of trade exercising any discrimination as to who shall receive from the telegraph companies these market quotations, or as to what telegraph companies shall be allowed facilities for distributing the information to the public.

It is opposed to the very spirit of its charter that it become a monopoly or a close corporation.

I am also of the opinion that even if the board of trade has the power to dictate to the telegraph companies as to who shall or shall not have the market reports or quotations, and should order (as it is alleged they have ordered) them not to furnish the same to complainant, that it would be no excuse or justification for the telegraph company removing these instruments or refusing to furnish the reports to complainants.

Can a common carrier say that he will not carry for A because B does not desire him to do so, or because he is under contract not to do so?

The case of the *State ex rel. v. Bell Telephone Company*, would appear to be decisive of this point. In that case the court held that "a public servant,"—as the respondent telegraph company is—"cannot avoid the performance of any part of the duty it owes to the entire public by any contract obligation it may enter into, even with the patentee of an invention. 11 Central Law Journal, 359.¹

To establish any other rule would be to enable common carriers and others occupying as to the public a like position—as we have seen this telegraph company does—to avoid their duty and obligations as public servants.

Such parties are not content to know what was the price of the commodity with reference to which they deal, upon yesterday or last week, but demand the latest market price up to the very instant the business is transacted. It appears to me that there are principles laid down in what are known as the "Express Company cases," which are applicable to this case.

In those cases, the railroad companies contended that it was no part of their duty as common carriers to carry express matter *as such* and attempted to discriminate as to express companies.

Judge Baxter, in one of the first of these cases, said, "that no such question could have arisen a half century ago." He traces the origin and growth of the express business, shows how it has grown "under the fostering care of the railroads,"

¹ See Jones on Telegraph and Telephone Companies, p. 41.—Ed.

into a "public necessity," and how it had "so interwoven itself into the present methods of doing business that it cannot be dispensed with, without producing an abrupt and disastrous revolution in the present mode of carrying on trade." It was held in those cases that although originally it was no part of the duty of the railroads to carry express matter, yet having done so for so many years, and thereby aiding to build up the express business into a "public necessity," it had become as much their duty to carry express matter as to carry freight, and the common-law obligation not to discriminate applies to both. See *Dinsmore v. L. C. & L. Ry. Co.*, 2 Fed. 465; *Southern Express Co. v. Memphis, etc., R. R. Co.*, 8 Fed. 799, 13 Central L. J. 68; *Southern Express Co. v. St. Louis, I. M. & S. Ry. Co.*, 10 Fed. 210.¹

As the express business grew into a public necessity under the fostering care of the railroads, so has the use of the market quotations grown into a public necessity under the fostering care of the telegraph companies. The knowledge of these market quotations, and the possession of facilities for obtaining that knowledge at the instant of trading, have become a necessity to those engaged in buying and selling stocks, grain, provisions, etc., and has so interwoven itself into the modern method of doing business that they cannot and will not now be dispensed with. It is profitable to the telegraph companies, useful, convenient and necessary to the public.

Whatever the business may have been when first undertaken by the telegraph companies, it is now no longer a private business. It is general in its nature and has become, under the principles laid down in the *Munn and Scott warehouse case*, "affected with a public interest."

Property becomes affected with a public interest and subject to control for the common good "when used in a manner to make it a public consequence, and affect the community at large." What is said in that case as to common carriers, may be said of this business carried on by the telegraph company; that "in carrying on their business they have duties to

¹ But see *The Express Cases*, 117 U. S. 1.—Ed.

perform in which the public are interested." Therefore "their business is affected with a public interest within the meaning of the doctrine which Lord Hale has so forcibly stated." *Munn v. Illinois*, 94 U. S. 113.

Not only did the telegraph companies originate this business but they have furnished facilities for obtaining these market quotations for years past without discrimination, until it has become a public necessity that such facilities and such quotations shall be furnished all who desire them. They will not now be permitted to say that their common-law obligation not to discriminate—attaching to their business of sending messages does not attach to this new "incidental business," at least so long as they carry it on. To permit them to do so would be to allow them to commit a fraud upon, and work irreparable injury to, complainant and others, who have engaged in business upon the faith of having these market quotations to aid them in carrying on the same.

The position that legislative action is necessary to impose these obligations upon the defendants is not tenable.

"The liabilities of common carriers were originally determined by the usages of trade and the opinions of the judges predicated upon the obligations they assumed, and the nature of their business." Scott and Jarnagin on Telegraphs, p. 248; *Vincent v. Chicago, & Alton Railroad Co.*, 49 Ill. 33; *The Express Co. cases, ante*.

I therefore hold that so long as the defendant telegraph companies are permitted to have their agents upon the floor of the board and gather these market reports or quotations and send them to others, they will not be permitted to discriminate against the complainants. If they obtain the same—no matter from what source—and send them to others, they must send them to complainants.

The principles declared in this opinion are not new. They are as old as the time of Lord Hale, who enunciated them more than two hundred years ago.¹ They are simply old rules applied to new facts. It has been well said "that the public

¹ De Jure Maris, 1 Harg. Law Tracts, 6, 78; De Portibus Maris, 1 Harg. Law Tracts, 78.—Ed.

welfare is the great and final test in matters at common law," and this is eminently so as regards privileged classes and monopolies. Also that the system of equity "is so constructed upon comprehensive and fruitful principles that it possesses an inherent capacity of expansion so as to keep abreast of each succeeding age and generation."

The motion to dissolve is overruled, and the injunction will be retained until the final hearing.

Opinion in Second Case.

MORAN, J.:—

This case I have considered since the arguments, and I have not been able, from anything I have seen, to change the opinion that I had formed at the time of the arguments—which I, in fact, had formed before the arguments were made at all. There have been in this case two motions to dissolve: one made by the board of trade, which was granted on the ground that the board of trade have the right to control their own premises and to permit anybody to come upon them or deny anybody the right to come upon them. At the time I dissolved that motion I intimated that I thought it a very different question with reference to the telegraph company. I still think the telegraph company stands upon an entirely different basis. The telegraph company is in the exercise of a public franchise; it holds itself out according to the allegations of the bill, and these allegations are not denied, to furnish these commercial reports to such persons as agree to its reasonable terms and regulations, and it is in the business of furnishing to such persons as make contracts with it and comply with its reasonable regulations, these commercial reports which it gathers up, attracts into its possession or gets control of by the messengers and agents it is permitted to have upon the floor of the board of trade. Now, it is said, it must refuse to transmit these commercial reports to the complainant in this case, because the board of trade says it shall do so, and threatens to drive it off the board of trade and deprive it of the facility of obtaining the information unless it complies with that demand. I have never seen how a telegraph com-

pany can be permitted, either of its own will or at the command or behest of another party, to discriminate in its service to the public. The theory that it may do this because this is not regular telegraph business—that is, it is not a dispatch signed by one person and handed to the company to be sent to another person, is the narrowest construction that can be given to telegraph business. To say it is in that business, and that the company need not engage in it if it does not want to, and then to argue from that, because the company might not be compelled, under forfeiture of its charter to engage in transmitting commercial news, that it may distinguish the persons it will transmit commercial news to, seems to me false reasoning. The business of transmitting commercial news has grown to be an exceedingly important business. I suppose it will not be extravagant to say, that it forms a very large part of the business of the telegraph companies as they are run at the present day. That the commercial information that they gather up by their agents at the different commercial centres, such as the price of grain, the price of stocks, railroad stocks, is most important information to the general public, and to people engaged in different occupations it can be seen at a glance. The business being to a certain extent incidental, is telegraph business in this sense: the company can exercise the power of eminent domain for the purpose of carrying it on; it has the right to condemn my land, or your land, or the land of any other citizen, and put its poles thereon for the express purposes of its business, and for this purpose alone of transmitting commercial news dispatches. If it exercises the power of eminent domain, it cannot be said that the business for which it exercises it, is special business and they can discriminate as to the persons they will send it to. The rule governing chartered bodies is always to prevent them discriminating against anybody, as that is the most dangerous way of building up monopoly. If the company can discriminate in the sending of commercial dispatches between different persons in a community, it may enrich one man and impoverish another one. Now, it does not seem that the law will permit that to be done upon any excuse whatever. The position taken

by counsel that a court of equity will not compel a company to transmit to an individual because the telegraph company can be made to supply the public, has its only support in cases in which there were no public questions involved at all, but where it was a mere question of private interests. I think this is clearly shown in the case of *Hawley v. Beardsley*, 47 Conn. 571.

Now one of the distinguishing features of the telegraph company's business, or of a railway company's business or of an express company's business, is that for any attempt to discriminate there is absolutely no remedy at law. I can conceive no rule under which damages can be claimed. Of late this has been discovered and recognized all over the country. There is no other way to control these chartered companies than by an appeal to a court of equity, and the courts of equity have issued these mandatory injunctions to prevent any discriminations at all. Now, there would appear some sort of incongruity in saying that the board of trade may drive anybody off its floors and still that the company must furnish these dispatches; in my opinion there is none whatever. I do not find it necessary to agree with a recent opinion that the board of trade may be controlled, or compelled to furnish, or let anyone get at its market reports. I do not find it necessary to decide that question one way or another. The board of trade may shut its doors and windows, and shut off all the ways by which its doings could be got to the public, and conduct its business in secret. That this would be a very bad thing for the board of trade to do I have no doubt. If the board of trade see fit to let the telegraph companies get the news, and the telegraph companies hold themselves out to supply it to all persons who will comply with its reasonable terms and regulations, it cannot give it to one person and withhold it from another. When the news passes from the board of trade to the telegraph companies, it belongs to the telegraph companies, and they must transmit to one person as another. If the board of trade puts the telegraph company off its floor, well and good. It is better that the telegraph company be prevented from getting the news at all than that it be per-

mitted under any excuse whatever to discriminate against any member of the public who wants to receive their work, and will comply with its reasonable conditions. As I said, if the board of trade puts the telegraph companies off its floors, well and good, the telegraph companies cannot send news they cannot get.

The gambling question is not in this case. It comes here as the case of a perfectly honest institution, carrying on, so far as the evidence before the court shows an honest business, just like any other honest business engaged in dealing on the board of trade. In that case a telegraph company engaged in transmitting commercial dispatches cannot refuse to supply it with such news; and, therefore, I cannot dissolve this injunction.

NOTE.

The same conclusion was arrived at by the supreme court in *The New York and Chicago Grain and Stock Exchange v. The Board of Trade of the City of Chicago*, 127 Ill. 153.

But in *Board of Trade of the City of Chicago v. Christie Grain and Stock Company*, 198 U. S. 236, it appeared that the Board of Trade collected at its own expense quotations of the prices offered and accepted, for wheat, corn and provisions in its exchange, and distributed them under contract to persons approved by it and under certain conditions. In a suit brought by it to restrain parties from using the quotations obtained and used without authority of the Board, defendants contended that as the Board of Trade permitted, and the quotations related to, transactions for the pretended buying of grain without any intention of actually receiving or paying for the same that the Board violated the Illinois bucket shop statute and that there were therefore no property rights in the quotations which the court could protect, and that the giving out of the quotations to certain persons makes them free to all. It was held that even if the pretended buying and selling is permitted by the Board of Trade it is entitled to have its quotations protected by the law, and to keep the work which it has done to itself, nor does it lose its property rights in the quotations by communicating them to certain persons, even though many, in confidential and contractual relations to itself, and strangers to the trust may be restrained from obtaining and using the quotations, by inducing a breach of the trust.—Ed.

(Circuit Court of Cook County. In Chancery.)

Public Grain & Stock Exchange

vs.

Western Union Telegraph Company.

1. **EQUITY PRACTICE—MATTER OF DEFENSE ARISING AFTER ISSUE JOINED—HOW RAISED.** A new defense arising after issue joined upon answer filed should be brought before the court by means of a cross-bill in the nature of a plea *puis darrein continuance*.
2. **SAME.** There are cases, however, where the new matter has been permitted to be brought in by supplemental answer.
3. **SAME—WHEN IMMATERIAL HOW DEFENSE PRESENTED.** In many cases it would be immaterial whether new matter is brought before the court by supplemental answer or cross-bill, as for instance, where a release has been obtained after answer filed and the only question raised is as to the fact of execution.
4. **SAME—NEW MATTER ARISING AFTER ISSUANCE OF INJUNCTION WHICH WOULD CAUSE DISSOLUTION OF SAME CAN ONLY BE RAISED BY CROSS-BILL.** Where an answer has been filed, issue joined and a motion to dissolve an injunction based upon such answer has been overruled, it would not be correct practice to permit a defendant to come in and set up new matter by means of a supplemental answer, where such new matter would defeat or avoid the injunction. The proper practice is to file a cross-bill.
5. **PUBLIC-SERVICE CORPORATIONS—RIGHT OF TELEGRAPH COMPANY TO DISCRIMINATE IN DISTRIBUTION OF BOARD OF TRADE QUOTATIONS—COLLUSION WITH BOARD OF TRADE—PARTIES.** Complainant filed its bill to enjoin the defendant from removing certain "tickers" from its place of business and from discriminating against it in furnishing board of trade market quotations gathered by the telegraph company on the floor of the board of trade. An injunction was issued, an answer filed and a motion to dissolve based on such answer, overruled. The telegraph company thereafter filed a supplemental answer to the effect that it was only able to gather the quotations on the floor of the board of trade with the consent of the directors of such board, that such directors had forbidden the defendant to supply the quotations to "bucket shops" and that complainant carried on such a shop. The evidence as to complainant carrying on a bucket shop was not sufficient to establish that fact. Held that the defendant could not set up such new matter in a supplemental answer where there is no allegation that there has been no collusion between the telegraph company and the board of trade, and unless the board of trade was made a party to the proceeding.

6. PARTIES—WHO ARE NECESSARY IN BILL TO COMPEL TELEGRAPH COMPANY TO FURNISH COMPLAINANT WITH MARKET QUOTATIONS OF BOARD OF TRADE. Where a bill is filed to compel a telegraph company to furnish market quotations of the board of trade, gathered by the telegraph company on the floor of such board, and it is averred that the board of trade claims such quotations as its private property and has forbidden the telegraph company to furnish the same to complainant, such board has a direct interest in the litigation and is therefore a necessary party to the suit.
7. SUPPLEMENTAL ANSWER—BRINGING IN NEW PARTIES BY. No person can be brought into a case by supplemental answer. It must be done by cross-bill.

Motion of complainant to strike supplemental answer from files and motion of defendant to dissolve or modify the injunction. Heard before Judge Murray F. Tuley.

For statement of facts see prior decision in same case, 1 Ill. C. C. 548, *supra*.

TULEY, J.:—

Whether or not the complainant is engaged in the business of running a bucket shop is not now before the court. The questions now to be passed upon arise upon the following state of the pleadings:

The complainant filed its bill to enjoin the Western Union Telegraph Company from removing certain telegraphic instruments and "tickers" from its place of business which the telegraph company had placed there in carrying on the business of furnishing the dispatches to all members of the public who were willing to pay its customary charges therefor.

The telegraph company answered the bill, claiming that it was under no legal obligation not to discriminate as to the persons to whom it should furnish these commercial news dispatches and market quotations of the Chicago board of trade and other centres of exchange, and that it was only able to gather the quotations and commercial news of the Chicago board of trade on the floor of the board by the sufferance of its board of directors, and subject to such conditions as the directors might impose; that the directors had forbidden the

telegraph company to send these news dispatches and quotations to "bucket shops;" that the complainant carried on such a shop and fell within the prohibition.

Upon a motion to dissolve the injunction which had been granted against the telegraph company, this court held, in substance, that the evidence submitted by the telegraph company—one affidavit, I believe,—was insufficient as against the numerous affidavits of complainant to show that complainants carried on a bucket shop. That the telegraph company had no power to discriminate as against complainant in the delivery of these quotations and commercial news, and that so long as the telegraph company continued in the business of gathering and delivering such news dispatches and quotations, it was bound to furnish the same to complainant upon the same terms and in the same manner that it did to other persons.

The motion to dissolve the injunction was overruled. Some months thereafter, the telegraph company, upon petition filed, prayed leave to file a supplemental answer. The leave was granted without argument upon a stipulation of the parties, that upon a motion to strike the same from the files, the same questions might be presented as could have been upon the petition for leave to file the same.

The complainant now moves to strike the supplemental answer from the files, and the telegraph company moves that the injunction be dissolved or modified. The substance of the supplemental answer is, that after the court overruled the motion to dissolve the injunction, the Chicago board of trade notified the telegraph company that it would no longer be permitted to gather the market quotations and news upon the floor of the board; that the board itself would gather and control the same, but that an arrangement might be made concerning the gathering and distributing such news and quotations.

That thereupon a certain agreement was made between the board of trade and the telegraph company on the 23d of April, 1884, which was in substance: That the board was to gather by its own agents these market quotations and deliver the

same to the telegraph company, and the company to send the same as private dispatches only to such approved correspondents as the board of trade (or its committee) might designate from time to time, and to such persons as the telegraph company might contract with, subject to the approval of the board; the telegraph company to collect from the parties receiving the same, in addition to the charges for telegraphing, an amount sufficient to pay the expense of gathering such dispatches, and out of such collections to pay the board of trade one thousand dollars per month, retaining the balance, if any, in its own hands, the board of trade to have the right to cut off any person from receiving such quotations and news at any time with or without cause, and with or without notice. The agreement could be terminated upon thirty days' notice.

The first question which arises is one of chancery practice, and is, whether or not new matter arising after issue joined upon answer filed and after overruling a motion to dissolve an injunction based upon such answer, can be brought before the court by means of a supplemental answer?

The complainant contends that such new matter can only be brought into the pleadings by means of a cross-bill in the nature of a plea *puis darrien continuance*, while the telegraph company contends that it may be done by a supplemental answer.

That a new defense arising after issue joined upon answer filed should be brought before the court by means of a cross-bill in the nature of a plea *puis darrien*, is laid down as the correct practice in Mitford, *Equity Pleadings*, p. 72; Lubes, *Equity*, p. 309; Story, *Equity Pleadings*, sec. 393; Adams, *Equity*, p. 402; *Taylor v. Titus*, 2 Edward's Chancery, 135. Numerous cases are cited by the authors named to sustain the text.

To sustain the position of the defendant, *Anonymous*, Hopkins' Chancery, 30, *Stamps v. Birmingham* and *Stour Valley Ry. Co.*, 2 Phillips Chancery, 673; *Southall v. The British Mutual Life Assurance Society*, 38 Law J. Ch. 711, and other cases are cited, as showing that new matter has been permitted to be brought in by supplemental answer.

I am of the opinion that in many cases it would be immaterial whether the new matter was brought before the court by supplemental answer or by cross-bill, as for instance, where a release had been obtained after answer filed and the only question made should be upon the fact of its having been executed. But where an answer has been filed, issue joined and a motion to dissolve an injunction based upon such answer has been overruled, it would not be correct practice to permit a defendant to come in and set up new matter of this kind by means of a supplemental answer for the reason, first, because neither the petition filed nor the supplemental answer itself contains any averment that there has been no collusion between the telegraph company and the board of trade, as to the new matter set out, for the purpose of defeating or avoiding the injunction pending in this case. I know of no way that the complainant can make an issue of that kind upon new matter set forth in a supplemental answer. Special replications are no longer used or permitted; second: It would not be correct practice because the new matter set up shows that the board of trade, claiming to own the quotations and news as private property, has a direct interest in the questions raised by the supplemental answer and is therefore a necessary party. No person can be brought into a case by way of supplemental answer, but by a cross-bill it may be done.

The board of trade is not a party to this litigation. It is not bound by any order or decree made or to be made herein. It would be manifestly improper for me to pass upon the grave questions presented by this answer and in which it has such a great interest without the board being first made a party to this litigation.

The motion to strike the supplemental answer from the files will be sustained. The motion to dissolve the injunction necessarily fails and will be overruled unless defendant wishes to withdraw the same.

(*Superior Court of Cook County. In Chancery.*)

Arthur H. Chetlain, et al.

vs.

Guiseppe De Grazie, et al.

(January 7, 1907.)

1. **TRUST DEED—ASSIGNEE OF—SUBJECT TO EQUITIES.** The assignee of a mortgage or trust deed takes it subject to existing equities between mortgagor and mortgagee. (See note.—Ed.)
2. **SAME—NOTICE TO GRANTOR.** The assignee of a mortgage or trust deed in order to protect his rights against secret equities between mortgagor and mortgagee, must give notice to the grantor in such mortgage. (See note.—Ed.)
3. **SAME—PAYMENTS TO TRUSTEE IN TRUST DEED.** Payments made to trustee by the mortgagor before maturity without notice from the holder of the note secured by such trust deed, will be applied as a credit on such note, in a bill to foreclose the trust deed.
4. **DEBTOR AND CREDITOR—CREATING RELATION BETWEEN TRUSTEE AND MORTGAGOR BY RECITALS IN RECEIPT FOR MONEY.** A trustee by accepting payments on account of an indebtedness secured by a trust deed cannot create the relation of debtor and creditor between himself and the mortgagor by recitals in receipts given on account of such indebtedness.
5. **NOTICE OF TRANSFER OF NOTE SECURED BY TRUST DEED—SUFFICIENCY OF.** A general notice from the holder of a note secured by a trust deed to pay a negotiable interest coupon to him is not a sufficient notice that he is also the holder of the principal note.
6. **MASTERS IN CHANCERY—SUCCESSORS OF—APPOINTMENT OF SPECIAL COMMISSIONER.** The court has the power to appoint a special commissioner to complete the unfinished business of a master in chancery where the term of office of such master has expired even though his successor has been appointed.¹

Bill to foreclose trust deed. Cross bill to cancel same. Heard on exceptions to master's report before Judge Willard M. McEwen. Superior court Gen. No. 231,730.

Statement of facts.

A bill was filed August 17, 1903, to foreclose a trust deed for \$1,200 made by De Grazie September 18, 1899. The de-

¹ But see *McLain v. People*, 85 Ill. 205.—Ed

fendant answered the bill and filed a cross bill against the complainant to cancel a prior trust deed for the sum of \$1,400 made September 22, 1894, and also a prior trust deed for the sum of \$200 dated April 29, 1895, and also a trust deed for the sum of \$200 dated September 18, 1899, made contemporaneously with the trust deed the complainants sought to foreclose. The cause was referred to Master in Chancery G. Fred Rush to take proofs and report his conclusions both as to the law and the facts to the court. The facts as disclosed by the report showed the following: The defendant De Grazie was an Italian immigrant who could neither read nor write and hardly understood the English language. On September 22, 1894, he applied to one Herman B. Wickersham, a lawyer and real estate and loan agent in the city of Chicago, for a loan of \$1,400 and gave as security a trust deed upon certain real estate in Chicago. The trust deed matured five years after date. On April 29, 1895, the defendant De Grazie applied for a further loan of \$200 and gave as security a second trust deed upon the same real estate, maturing three years after date. De Grazie made payments upon these loans from time to time and on September 18, 1899, the \$200 note secured by the second trust deed had been paid but the trust deed had not been released. On the latter date De Grazie executed two trust deeds, one for the sum of \$1,200 and the other for the sum of \$200 in place of the \$1,400 trust deed of September 22, 1894. In 1889 De Grazie had purchased the mortgaged premises from Wickersham and had paid the purchase price thereof in small installments from time to time as he was able to do. These payments were made prior to 1894. Wickersham was the trustee in each of the trust deeds. After the execution of the two trust deeds in September, 1899, De Grazie made an agreement with Wickersham that he might make payments on his indebtedness in small installments as he was able and as he had done in his previous dealings with Wickersham. De Grazie or some member of his family made payments upon the principal and in addition paid the interest upon both loans as the same matured. The evidence disclosed that De Grazie made the various payments at the office of

Wickersham and in each instance received a receipt in the following form:

“Received of Joe De Grazie \$100 on which I agree to pay interest at 7 per cent per annum. Also received \$2.00 interest to date.

“HERMAN B. WICKERSHAM,”

The bill was filed to foreclose the trust deed of September 18, 1899, for the sum of \$1,200. The evidence disclosed that De Grazie had up to the date of the filing of the bill, paid upon the entire indebtedness of \$1,400 the sum of \$1,000 and all the interest accruing up to the time of the filing of the bill. De Grazie had no notice of any kind at the time of the making of the various payments to Wickersham that any person other than Wickersham was the owner or holder of any of the notes secured by the various trust deeds. On September 15, 1902, however, De Grazie received a letter from Frank E. Hayner, the former partner of Wickersham, which letter was as follows:

“Mr. Guiseppe De Grazie,
“856 W. Huron St.,
“Chicago.

“Dear Sir:

“Your semi-annual interest on loan of \$1,200, such interest amounting to \$36, is due and payable at my office on Thursday, the 18th inst., on or before which day call and pay the same.

“FRANK E. HAYNER.”

On September 18, 1902, De Grazie went to the office of Wickersham with the letter received from Hayner, and being unable to read the same showed it to Wickersham. Wickersham tore the letter open and threw it into the waste basket and told De Grazie to pay him (Wickersham). De Grazie thereupon paid him the interest and \$200 on account of the principal and received a receipt in the form above described. The evidence disclosed that Wickersham remitted the full amount of the interest due on September 18, 1902, to the

complainant who was the owner of the interest note. In November, 1902, Wickersham became insolvent, fled the country and became a fugitive from justice. A large number of indictments for embezzlement were thereafter returned against Wickersham. The complainants showed that the notes secured by the trust deeds were transferred to them shortly after the execution of the trust deeds. It was contended by the complainants that the payments made by De Grazie to Wickersham should not be credited upon the notes secured by the several trust deeds for the reason that the complainants were the owners of the notes and Wickersham had no authority to receive any part of the principal of the debt. It was also contended that the letter sent by Hayner to De Grazie on September 15, 1902, was notice to De Grazie that Wickersham was not the owner of the notes secured by the trust deeds. The cause came before the court on exceptions to the report of G. Fred Rush, who was appointed a special commissioner after his term of office as master in chancery had expired. The court held that an assignee of a trust deed or mortgage takes the same subject to existing equities between the mortgagor and the mortgagee; that the assignee of a mortgage or trust deed, in order to protect his rights against secret equities between mortgagor and mortgagee, must give notice to the grantor in the mortgage that he is the owner and holder of the note; that in the absence of such notice, payments made to the trustee in the mortgage before maturity, will be applied on the note so secured in a bill to foreclose the trust deed. It was also held that the notice from Hayner to pay the interest due to him was not a sufficient notice that he was the owner or holder or the agent of the owner or holder of the principal notes.

After the proofs before the master had been closed and before he had made up his report, the master's term of office expired by its own limitation. The defendants contended that under the statute of Illinois (vol. 2, Starr & Curtis Rev. Stat., chap. 90, sec. 8) the unfinished business of such master should be completed by his successor in office without an order of court. The court, however, appointed the master before

whom the evidence had been heard, a special commissioner to complete his report.

The following decree was entered by the court:

This cause coming on to be heard upon the bill of complaint of the said complainants, Arthur H. Chetlain, successor in trust of the trust deed dated the 18th day of September, 1899, and recorded in the recorder's office of Cook county, Illinois, on November 3rd, 1899, in book 6,796 of records on page 271 as document number 2,839,130, and Alice A. Havemeyer and the answers of Guiseppe De Grazie, Rocella De Grazie, James Baraglia and Samuel H. Pratt and the joint and several answer of Frank E. Hayner, successor in trust to the trust deed dated September 22nd, 1894, and recorded in the recorder's office of Cook county, Illinois, in book 4,571 of records at page 570, Arthur H. Chetlain, successor in trust in the trust deed dated the 18th day of September, 1899, and recorded on the 3rd day of November, 1899, in the recorder's office of Cook county, Illinois, in book 6,796 of records at page 273 thereof and upon the respective replications of complainants thereto, and also upon the cross-bill of complaint of Guiseppe De Grazie and Rocella C. De Grazie, cross complainants, and the cross answers of James Baraglia and Samuel H. Pratt and upon the joint and several answers of Arthur H. Chetlain, successor in trust in the trust deed dated September 18, 1899, and recorded in the recorder's office of Cook county, Illinois, on book 6,796 at page 271 and Alice A. Havemeyer and the joint and several answers of Frank E. Hayner, successor in trust in the trust deed Sept. 22, 1894, and recorded in the recorder's office of Cook county, Illinois, in book 4,751 at page 570 thereof, and Arthur H. Chetlain, successor in trust in the trust deed dated Sept. 18, 1899, and recorded in the recorder's office of Cook county, Illinois, in book 6,796 at page 273 thereof, to the cross-bill of Guiseppe De Grazie and Rocella C. De Grazie, and upon the respective replications of the cross-complainants thereto, and upon the proofs and exhibits herein, and the report of G. Fred Rush, special commissioner of this court, and upon the exceptions of Guiseppe De Grazie and Rocella C. De Grazie to said special commissioner's report and

upon exceptions of Arthur H. Chetlain and Alice A. Have-meyer to said special commissioner's report, and it appearing that all the parties have filed their respective answers to the bill and cross-bill herein and are properly before the court. The court finds that it has jurisdiction of the subject matter and of the parties hereto, and that the bill of complaint and cross-bill of complaint are at issue.

The court further finds that the \$200 promissory note described in the bill and cross-bill of complaint dated April 29, 1895, secured by trust deed of same date upon lot sixty-four (64) in the resubdivision of block three (3) in Wright and Webster's subdivision of the northeast quarter (N. E. 1-4) of section twelve (12) township thirty-nine (39) north range thirteen (13) east of the third principal meridian (except the east sixty-seven (67) feet of said block) together with all buildings and improvements thereon and to be thereafter placed on, has been paid in full and should be released and satisfied of record.

The court further finds that the \$1,400 promissory note described in the bill and cross-bill of complaint, dated September 22, 1894, and secured by trust deed upon said premises hereinbefore described has been fully paid and satisfied by the receipt and acceptance of a \$1,200.00 note dated September 18, 1899, which was given for and accepted by said complainant in satisfaction of the balance remaining due on said \$1,400 note at the time of the delivery of said \$1,200 note, should be released and satisfied of record.

The court further finds that the promissory note for \$200 dated September 18, 1889, secured by trust deed upon said premises hereinbefore described and known as the James Baraglia note herein has been paid in full, and that said trust deed should be released and satisfied of record.

The court further finds that the \$1,200 promissory note described in the bill and cross-bill of complaint dated Sept. 18, 1899, held by defendant Samuel H. Pratt, is without any consideration as to complainants and defendants herein, and is a forgery and is null and void.

The court further finds that the defendant Guiseppe De

Grazie and Rocella C. De Grazie are entitled in equity to a credit of \$800 on the \$1,200 promissory note described in the bill and cross-bill of complaint held by complainant Alice A. Havemeyer, dated September 18, 1899, and secured by trust deed upon the premises hereinbefore described.

The court further finds that complainants exceptions to said special commissioner's report are not well taken and should be overruled.

The court further finds that the exceptions of Guiseppe De Grazie and Rocella C. De Grazie to said special commissioner's report are well taken and should be sustained except as to exceptions 3, 6, 12, 13, 15, 20, 21 and 22, and as to those exceptions the same should be overruled.

The court further finds that the said payments aggregating \$800 on said \$1,200 note were payments made to Herman B. Wickersham, the trustee in the various trust deeds hereinbefore described; that said payments were made by the defendant De Grazie or some member of his family to said Wickersham without any notice whatsoever from the legal holder and owner of the various notes secured by said trust deeds hereinbefore described, and were rightly and properly made to said Herman B. Wickersham.

The court further finds that the complainant, Alice A. Havemeyer, the owner and holder of said \$1,200 promissory note dated September 18, 1899, has received the full interest on the principal sum up to September 18, 1902, from said Herman B. Wickersham, the trustee in the various trust deeds hereinbefore described, and that complainant, Alice A. Havemeyer has received as interest on the said promissory note for \$12,000, dated Sept. 18, 1899, the sum of \$216 and that said complainant was entitled to receive only the sum of \$184.90 as interest for the reason that the principal amount had been reduced from time to time, and that by reason of such excess, the entire interest on the said note up to the 1st day of January, 1904, has been paid.

The court further finds that the defendants, Guiseppe De Grazie and Rocella C. De Grazie were not in default in the payment of either the principal or interest at the time the bill was filed in this case, to-wit: August 17, 1903.

The court further finds that complainants bill to foreclose said trust deed was prematurely filed, and that none of the material allegations in said bill have been proven, and that said bill is without equity.

The court further finds that the defendants, De Grazie and Rocella C. De Grazie are now indebted to the complainants in the sum of \$14.00 for insurance placed upon said premises together with seven per cent. interest thereon from the 12th day of November, 1903, to date, in accordance with the provision of said trust deed sought to be foreclosed.

The court further finds that the defendants De Grazies are indebted to the complainants in the sum of \$400 with interest thereon from the 1st day of January, 1904, to the date of this decree at seven per cent. per annum from which amount must be deducted the sum of \$78.10 special commissioners' fees paid in this case by said defendants DeGrazies and also the sum of \$3.00 appearance fees paid in this case by said defendants De Grazies.

The court further finds all the material allegations in the cross-bill of complaint are true and have been proven; that the equities in this case are in favor of cross-complainants.

It is further ordered, adjudged and decreed that the exceptions of Guiseppe De Grazie and Roeella C. De Grazie to said special commissioner's report be and they are hereby sustained except as to exceptions 3, 6, 12, 13, 15, 20, 21 and 22 and as to those exceptions each and every of the same is hereby overruled.

It is further ordered, adjudged and decreed that the complainants' bill of complaint be and the same is hereby dismissed for want of equity at the costs of complainants herein.

It is further ordered, adjudged and decreed that complainants' exceptions to said special commissioner's report be and the same are hereby overruled.

It is further ordered, adjudged and decreed that defendants De Grazies are indebted to said complainant, Alice A. Havemeyer in the sum of \$400 together with interest thereon from the 1st day of January, 1904, to date of this decree upon a promissory note for \$1,200 dated September 18, 1899, secured by a trust deed upon the premises hereinbefore described, and

are also indebted to said complainant Alice A. Havemeyer, the sum of \$14.00 for insurance together with interest thereon at seven per cent. from the 12th day of November, 1903, to the date of this decree from which sums must be deducted the sum of \$78.10 special commissioner's fees paid in this case by said defendants De Grazies and also the further sum of \$3.00 appearance fees paid in this case by said defendants De Grazies. And that upon said defendants Guiseppe De Grazie and Rocella C. De Grazie or either of them paying to the said Alice A. Havemeyer said sums after said deductions as aforesaid, that said Arthur H. Chetlain, successor in trust, shall execute and deliver to said Guiseppe De Grazie and Rocella C. De Grazie a good and sufficient release deed of said trust deed dated Sept. 18, 1899, upon said defendants De Grazies paying to said Arthur H. Chetlain, successor in trust, his reasonable fee therefor.

It is further ordered, adjudged and decreed that said promissory note for \$200, dated Sept. 18, 1899, has been paid in full, said note is known as the "Baraglia promissory note," that said Arthur H. Chetlain successor in trust of said trust deed dated Sept. 18, 1899, securing said promissory note of even date for \$200, known as the Baraglia promissory note herein shall execute and deliver to said defendants De Grazies, a good and sufficient release deed of said trust deed, dated Sept. 18, 1899, upon said defendants paying to said Arthur H. Chetlain, successor in trust his reasonable fee therefor.

It is further ordered, adjudged and decreed that said promissory note for \$1,400, dated Sept. 22, 1894, has been paid in full and that Frank E. Hayner, successor in trust in said trust deed dated Sept. 22, 1894, securing said promissory note of even date for \$1,400, shall execute and deliver to said Guiseppe De Grazie and Rocella C. De Grazie a good and sufficient release deed of said trust deed dated, Sept. 22, 1894, upon said defendant paying to said Frank E. Hayner, successor in trust, his reasonable fee therefor.

It is further ordered, adjudged and decreed that said promissory note for \$200, dated April 29, 1895, has been paid in full and that said Arthur H. Chelain, successor in trust, of said trust deed, dated April 29th, 1895, securing said promis-

sory note of even date for the sum of \$200, shall execute and deliver forthwith to said Guiseppe De Grazie and Rocella C. De Grazie a good and sufficient release deed of said trust deed, dated April 29th, 1895, upon said defendants paying to said Arthur H. Chetlain, successor in trust, his reasonable fee therefor.

It is further ordered, adjudged and decree that the promissory note held by defendant Samuel H. Pratt, is without consideration as to the complainants and defendants herein and is a forgery and is null and void.

Frank E. Hayner, solicitor for complainants.

Carey W. Rhodes, solicitor for De Grazie *et al.* defendants and cross-complainants.

Morris St. P. Thomas, solicitor for Samuel H. Pratt, defendant.

Donald L. Morrill, solicitor for James Baraglia, defendant.

NOTE.

I.

The assignee of a mortgage or a trust deed takes it subject to existing equities between the mortgagor and the mortgagee. *McAuliffe v. Reuter*, 166 Ill. 491; *Buehler v. McCormick*, 169 Ill. 269; *Olds v. Cummings*, 31 Ill. 188; *Chicago Title & Trust Co. v. Aff*, 183 Ill. 91; *Bouton v. Cameron*, 205 Ill. 50; *S. C.* 72 App. 264; *Elser v. Williams*, 104 Ill. App. 238; *Romberg v. McCormick*, 194 Ill. 205; *Napieralski v. Simon*, 198 Ill. 384; *Humble v. Curtis*, 160 Ill. 193; *Thompson v. Shoemaker*, 68 Ill. 256; *Summer v. Waugh*, 56 Ill. 531; *Sroelowitz v. Schultz*, 86 Ill. App. 341.—Ed.

II.

The assignee of a trust deed or mortgage in order to protect his rights must give notice to the grantor. *Napieralski v. Simon*, 198 Ill. 384; *McAuliffe v. Reuter*, 166 Ill. 491; *Sheldon v. McNall*, 89 Ill. App. 138; *Buehler v. McCormick*, 169 Ill. 269; *Williams v. Pelley*, 96 Ill. App. 346; *Sroelowitz v. Schultz*, 191 Ill. 249; *S. C.* 86 Ill. App. 341.—Ed.

(*Supreme Court of Illinois.*)

Robert W. Hyman.

vs.

James H. McVeigh.

(January 21, 1878.)

1. **STATUTE OF LIMITATIONS—WHEN CAUSE OF ACTION ACCRUES.** The words “when a cause of action has arisen,” as they occur in the statute of limitations pleaded, mean when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, or in other words when the plaintiff has the right to sue the defendant in the courts of the state, upon the particular cause of action without regard to the place of its origin.
2. **PLEAS—STATUTE OF LIMITATION.** Pleas of the statute of limitations of a foreign state are not subject to demurrer in not alleging the continued residence of the defendant in the foreign state, it not appearing that any exception is made by the law of such foreign state as pleaded as against those who depart the state after the statute of limitations begins to run. If the statute makes such an exception the proper course is to reply and not to demur.

Appeal from the Circuit Court of Cook County.

For statement of facts see opinion.

F. H. Kales, solicitor for appellant.

S. M. Packard, solicitor for appellees.

Opinion per curiam:—

The sufficiency of the pleas demurred to in this case is determined, in the main, by our decision in *Hyman v. Bayne*, 83 Ill. 256. An able and interesting argument has been listened to in the present case, with pleasure, contending for a different construction of the statutes than the one given in that case, but it has failed to satisfy us that we should overlook our former opinion and adopt the views contended for by appellees.

The defense set up by the pleas in respect to the residence of appellant in the state of New York, and the limitation laws of that state, in our opinion, is not essentially different in

principle from that set up by the pleas in respect to his residence in Maryland, and the limitation laws of that state.

The words "when a cause of action has arisen," as they occur in the statute pleaded, should be construed as meaning, when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if properly invoked—or in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action without regard to the place where the cause of action had its origin. This was the view taken in *Hyman v. Bayne, supra*, although not discussed at length in the opinion, and we do not conceive that the question need be discussed now.

In respect to the constitutional objection to the construction we have given the statute, we deem it only necessary to add that the recent case of *Chemung Canal Bank v. Lowery*, 93 U. S. 72, is in harmony with what we said in that respect, in *Hyman v. Bayne, supra*.

As to those pleas that do not aver the continued residence of the plaintiff in the particular foreign state it does not appear that any exception is made by the law of the state as pleaded, as against those who depart the state after the statute of limitations begins to run. This the demurrer admits. If the statute makes such exception, appellees instead of demurring should have replied to it.

We are of the opinion the court below erred in sustaining demurrers to the several pleas of appellant, in the present indicated in *Hyman v. Bayne, supra*, and herein alluded to, and for this error the judgment is reversed and the cause remanded.

Reversed and remanded.

NOTE.

The above case though unreported is a leading case which has been cited with approval in the following cases: 142 Ill. 449; 157 Ill. 541; 14 Ill. App. 62; 36 Ill. App. 376; 39 Ill. App. 597; 46 Ill. App. 115; 80 Ill. App. 258; 104 Ill. App. 201.—Ed.

(Superior Court of Cook County.)

Illinois Glass Company
vs.
Chicago Telephone Company.

(Opinion of May 19, 1905.)

1. **TELEPHONE COMPANIES—DUTY TO FURNISH MODERN EQUIPMENT AT RATES FIXED BY ORDINANCE.** Where a telephone company accepts an ordinance under which it is permitted to use the streets of the city for the purpose of placing its poles and wires, and it is provided in such ordinance that the company shall not increase the rates then established for telephone service, the company is bound to furnish telephones of modern construction and appliances at the ordinance rate.
2. **DURESS — PUBLIC-SERVICE CORPORATION — PAYMENT OF EXCESS CHARGES TO—RIGHT TO RECOVER BACK.** Where a subscriber demands a telephone and he cannot procure the same without yielding to an extortionate demand and signing a contract to pay an excessive rate, and he does so yield, this constitutes duress and the excess may be recovered back in an action for money had and received.
3. **DURESS—COMMON-LAW DOCTRINE—GROWTH OF.** The doctrine of duress at common law was confined originally to duress of the person, but subsequently it was extended to include duress of goods. Under the modern decisions it includes "moral duress" or duress of business necessities.
4. **SAME—WHAT CONSTITUTES—EXISTENCE OF ALTERNATIVE OR OTHER LEGAL REMEDY AS BAR TO RECOVERY OF MONEY PAID.** Where a party for a number of years uses an inferior class of telephone service which is usable to the extent that it is possible to carry on a conversation subject to interruption, contracts for a higher grade of service at a rate in excess of that fixed in a city ordinance, the payment of such excess cannot be considered as involuntary where the party paying was not forced to have the better service and it could have obtained relief by applying for an injunction.
5. **DURESS—ONLY EXISTS WHERE THERE IS NO ALTERNATIVE.** Where a party is called upon to submit to an illegal demand and he has no other alternative but to submit, such payment cannot be considered as voluntary and he may recover back such amount.
6. **SAME—NECESSITY OF PROTEST.** Where a payment is made under duress, and a protest would be unavailing, no protest need be made. But if a protest would be availing to stop the payment of the money, a protest would be necessary.

(Opinion of August 24, 1906.)

1. **TELEPHONE COMPANIES—RATES FOR TELEPHONE SERVICE—RIGHT TO INCREASE ON ACCOUNT OF IMPROVED APPARATUS.** Where a city grants to a telephone company by ordinance the right to transact its business in the city and it is provided in such ordinance that the telephone company shall not increase to its present or future subscribers the rates then established for telephone service, such company has no right to thereafter increase its rates even though it furnishes an improved service not known at the time of the adoption of the ordinance.
2. **SAME—DUTY TO FURNISH IMPROVEMENTS.** Under such ordinance the telephone company cannot be required to adopt improvements in its service or equipment, but if it does so it is restricted to the rate provided for in its ordinance.
3. **DURESS—WHAT CONSTITUTES—PAYMENTS MADE TO PUBLIC-SERVICE CORPORATION IN EXCESS OF LEGAL RATE.** The plaintiff for a number of years made payments for an improved telephone service in excess of the rates fixed by ordinance. The plaintiff had previously had in his place of business an inferior type of telephone service at the ordinance rate. Both parties believed at the time of making the contract for such excess payment that the telephone company had the right to demand the excess payment. Nothing was said about the relative rights of the parties at the time the contract was made. The defendant was first approached by the plaintiff and the matter was concluded without protest on the part of the plaintiff and without any threat on the part of defendant to disturb the existing telephone service then in operation in plaintiff's place of business. The evidence did not disclose an immediate necessity for the improved telephone service as the inferior service was usable and practically efficient. *Held* that such payments were voluntary and could not be recovered back.
4. **DURESS DEFINED.** Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will.
5. **SAME—CONSCIOUSNESS OF ILLEGALITY OF DEMAND.** To constitute an involuntary payment both parties must have a consciousness that the demand is unlawful at the time of such payment.
6. **SAME—EXERCISE OF FREE WILL.** And where plaintiff in making excess payments was under no immediate necessity of doing so and where nothing was said or done which deprived it of the exercise of its free will, the payments will be considered as voluntary.
7. **SAME—SUCCESSIVE PAYMENTS.** Where payments are made successively for nearly five years without any discussion or con-

tention of any sort, and without any protest, or suggestion that the amount was excessive, no recovery can be had.

8. SAME—WHEN PAYMENTS ARE VOLUNTARY—KNOWLEDGE OF RIGHTS. Money voluntarily paid, without protest, and where there is not present the element of duress, cannot be recovered back, where it appears that the parties either knew or were chargeable with knowledge of their rights, and of the unlawful exaction at the time of payment. This is the rule in tax, water and gas cases without exception.
9. SAME—IGNORANCE OF LEGAL RIGHTS—ALTERNATE REMEDY. Where plaintiff mistook his legal rights under an ordinance, and in ignorance of the law affecting the contract, freely, tamely and unprotestingly entered into it, and in faith of it uncomplainingly and voluntarily continued for nearly five years to pay the excessive contract price, a condition which could have been relieved by protest or by the aid of an injunction, no recovery could be had.
10. MUNICIPAL ORDINANCES—IGNORANCE OF, ONE OF LAW. An ordinance granting to a telephone company the right to use the streets of the city,—in which ordinance it is provided that the telephone company shall not increase its established rates for telephone service—has the force of law within the limits of the municipality, and ignorance of the provisions of such ordinance is ignorance of law and not of fact.
11. MAXIMS—EX ÆQUO ET BONO. The maxim of *ex æquo et bono* is one of equity.
12. SAME—RECOVERY OF MONEY WHICH DEFENDANT IN EQUITY AND GOOD CONSCIENCE OUGHT NOT TO RETAIN. A recovery can not be had *in an action at law* for money paid merely because the defendant *ex æquo et bono* ought not to retain it. But this maxim may receive an additional exemplification in equity.

Action of assumpsit. Heard before Judge Jesse Holdom and a jury. Verdict directed for defendant at close of plaintiff's evidence, May 19, 1905. Motion for new trial overruled August 24, 1906. Gen. No. 231,203.

Statement of facts.

The plaintiff, Illinois Glass Company, a corporation, commenced its action in assumpsit against the Chicago Telephone Company, on July 17, 1903, to recover charges for telephone service rendered it by defendant in excess of rates fixed therefor in defendant's ordinance. The declaration consisted of the common counts. The defendant pleaded the general issue

and the five year statute of limitations. A trial was had before the court and a jury, and at the close of plaintiff's evidence the court, instructed the jury to find the issues for defendant. A motion for a new trial was overruled, and judgment was entered against plaintiff.

The defendant was organized in 1884 to carry on a telephone business. On January 4, 1889, the city council of the city of Chicago passed "an ordinance authorizing the Chicago Telephone Company to construct, maintain, and operate a line of telephone wires in the city of Chicago."

By section 1 of the ordinance permission and authority were granted defendant to construct, maintain and operate in the public streets and alleys of the city of Chicago, for twenty years, a line or lines of wires, or electrical conductors for the transmission of sound and signals only by means of electricity.

Section 6 provided: "Said company, during the term for which this ordinance is granted shall not increase to its present or future subscribers the rates for telephone service now established. And provided, also, that with the acceptance hereinafter required, there shall be filed by said company a schedule showing the rates charged by said company for telephone service at the date of the passage of this ordinance within the limits of the city of Chicago."

The schedule of rates provided: "Within the blue lines on the map of Chicago attached hereto and made a part hereof, we charge \$125 per annum for telephone instruments connected by wire with our exchange, for the business use of the lessee and his employes alone."

The evidence disclosed that the defendant had a complete monopoly in the city of Chicago in the telephone business; that in 1889, the time the ordinance in question was passed, the defendant had but one kind of telephone service, known as a grounded circuit; that in 1893 it introduced a greatly improved service known as a metallic circuit service which to a large extent was free from inductive disturbances to which the grounded circuit was subject; that the legal charge under the ordinance within the "blue line" district, for a business telephone was \$125 per annum; that the defendant charged

\$175 per annum for its metallic circuit service; that it was the custom of defendant to require every one of its subscribers to sign a contract; that if any person desired a metallic circuit business telephone within the "blue line" district he was obliged to pay \$175 per annum therefor; that the plaintiff also leased from the defendant an extension telephone for which it paid at the rate of \$50 per annum which was later reduced to \$30 per annum; that such extension telephones were not furnished in connection with grounded line instruments; that all payments for telephones were required to be made quarterly in advance. The plaintiff originally had a grounded circuit telephone but experienced considerable trouble in hearing and getting connections; that plaintiff was informed by the defendant that if they wanted better service they would have to get a metallic circuit telephone and would have to pay therefor \$225 for such telephone and an extension. The plaintiff for the purpose of getting better service and procuring an extension telephone, signed a contract for the new equipment and paid the excessive rate for five years, and then sued to recover back such excess. A large amount of evidence was introduced to show the unsatisfactory nature of the grounded line service and the superior service rendered by the metallic circuit.

At the close of the plaintiff's case the court instructed the jury to find the issues for the defendant. A motion for a new trial was thereafter overruled and judgment rendered on the verdict. Two opinions were rendered, the first upon the motion of the defendant to direct a verdict and the other upon the motion for a new trial.

Isaac H. Mayer, of Moran, Mayer & Meyer, attorney for plaintiff.

Charles S. Holt, of Holt, Wheeler & Sidley, attorney for defendant.

(Opinion rendered May 19, 1905.)

HOLDOM, J.: (orally)—

I have listened attentively to this very interesting and protracted argument of counsel for both sides in this case with a

great deal of interest. It is not a question that is entirely free from doubt, so far as the decisions which we have been over are concerned, and there are cogent reasons in law for the position taken and contended for by the champion of either side in this court.

It is not only a very interesting question, but it is a very important question on principle, on the rights of the parties and more especially as to the rights of others whose interests underlie this particular case, which, being not measured by the underlying interests would be of no importance and this extended investigation, I am free to say, would not have been indulged by the court.

In judicial history, a case akin to this, following the same principles, on the equity side of the court, is the Illinois Manufacturers' Association case against this defendant, reported in 106 Ill. App. 54. I want to say now, before I say anything else, that I feel constrained to hold that wherever the principles enunciated in this case are involved and are applicable here in the case at bar, I am bound. So I may say that in the logical reasoning of the decision of the learned chancellor at *nisi prius*, Judge Tuley, so far as that opinion is not clearly *obiter*, I am bound.¹

I am of the opinion that under the ordinance of the city of 1889, section 6, accepted by the defendant, that they were bound to furnish telephones of modern construction and appliances to the subscribers for \$125.00 per annum and they are not under the law, under that ordinance, entitled to charge \$175, the contract price agreed upon by the parties in the case at bar.

The motion is to instruct the jury on the evidence of the plaintiff to find the issues for the defendant, and that is upon the theory that the questions of fact resolve themselves into one of law, namely that the plaintiff is not, under the evidence, with all its legitimate intendants to be drawn from it, entitled to recover. As I have looked upon this case the last few days, and I have not changed my opinion yet, that there

¹ *Illinois Manufacturers' Association, et al. v. Chicago Telephone Company*, 1 Ill. C. C. 119.—Ed.

lies at the foundation of this case, and it is the pivotal and turning point, the fact of whether or not this evidence establishes the claim of duress, and that aside from any question of protest.

Now, as I have said, it is not easy to agree upon legal principles. You gentlemen, sitting in consultation at times with other counsel associated with you, sometimes against you, where you are seeking to attain to a legal conclusion on facts, which you are ready to admit in order to obtain a settlement, will agree upon the law but will very much disagree on its application, even to the agreed facts. So, while we haven't much disagreement about the law, the difficulty is in applying the legal principles to the facts of the case in hand. There are no cases that on the facts are akin to this case at bar. I am free to admit that had this plaintiff gone at the time it did, in 1897, to the telephone company, and then being without a telephone, had said "We want a telephone, we have a right to this telephone, we want the metallic circuit, we want it for \$125 a year," and the company had refused and said "No, we can't do that, the service has been improved since the passage of the ordinance; that that wasn't the service contemplated by the ordinance, we have got the grounded service which we will furnish you, and that was the kind of service contemplated by the ordinance" and then the plaintiff had yielded to the demands so further made by the telephone company and had signed the contract for \$175.00 a year, I think I should hold without any sort of hesitation that that was duress.

Now, the old doctrine of duress was first to the person, and then to the goods and then there has been interpolated by the more modern decisions, moral duress, which is construed to mean business necessity, and this case, if it falls within either of these definitions, must fall under the latter one of moral duress.

Graham is the only witness that testifies in relation to what was said and done at the time of the making of this contract for the metallic circuit service and he did that in consultation with Mr. Levis. They had a telephone which had proven unsatisfactory, sufficient, with trouble, to conduct their tele-

phone business over it. There were these interruptions; Graham seemed to complain more about the "busy" buzz than anything else, but I think that is immaterial. I think this evidence shows that service was growing worse and that they needed the advantage of the development of the science of the telephone and the telephone system and they really needed, for comfort, the metallic circuit service. He was willing, under the instructions of his superior officer in the plaintiff corporation, to make the bargain he did make. Levis said "Do the best you can, if you have to do it, do it." I don't want to be understood as intimating that that is a good contract, because the 106 Ill. App. 54 says it is not, and I agree with it. It is only pertinent to the question of duress. In some of these cases, one of them particularly, it has been stated that the courts differ in relation to this question of duress, but in order to constitute duress, the parties all agree the payment must be involuntary, and that is the question here. Was there an alternative way out of the difficulty? Were they forced to have the metallic circuit service? Were they at the mercy, as it were, of the telephone company? Was there this moral duress in relation to their business that their necessities were such that they must have this metallic service and therefore had no time to stop and straighten out the difficulties and demand their rights? In other words, couldn't they have gone on using the grounded service for just a little bit longer while they applied to the court for an injunction, as was done five years afterwards? That was done and they could have done it just as easily in the first place as was done by others five years afterwards. In these cases that hold there was duress are the cases of the gas company, a monopoly, a public utility corporation; there was no alternative. It must be that gas or no gas. In the water case, the case of the water company of the city of Chicago¹ controlling the water works, that is a monopoly business, water is a necessity and our forefathers got along with very little water, but we need a good deal and socially water is a necessity; therefore in the Northwestern Mutual Life Insurance Company case,¹ when they

¹ *City of Chicago v. Northwestern Mutual Life Insurance Co.*, 218 Ill. 40.—Ed.

took that property under their mortgage and found resting upon it the claim of the city for back water taxes and where the city said "Unless you pay, we will disconnect this water service," that was duress. They had no alternative; they must have water; that was a necessity; they could only get it from the city and therefore there was duress and money paid in that way could be recovered, because it was involuntary.

Where there had been unjust discrimination in freight or where the freight rates were unreasonable, in these railroad cases, you will find in each one of those cases there was no alternative; whether paid under protest or not, the fact of duress existed; duress, of a moral character, of business. The goods must go now; the goods must come out of the freight house now, whether perishable or not, made no difference; they must be used in the business of the party, which is a business that can't stop for a law suit or the slow processes of the court. Therefore in all of those cases there was duress.

In the Yates case,¹ it was not held to be duress and yet large sums of money were paid, and the supreme court held, voluntarily—under what? A void law. The supreme court had nothing to do with what the rest of the law was; it was not involved in that case and they had nothing to talk about, and that was the only matter before them—the question whether the insurance company was entitled to recover back the money which it was admitted was paid under a void law. There was no necessity of paying it in the first instance. They held the payment not being compulsory, there was no duress and therefore it was a voluntary payment and they could not recover it back.

There is no pretense that anything was ever said between Graham or any other officer of this company to the telephone company which would indicate that there were any protests, although the way I look at this case, it was not necessary; if there was duress, I am inclined to concede Mr. Mayer's contention as to the law at the present day in this state; that if there is duress, and a protest would be unavailing, then no protest need be made. If you had a case where there was

¹ *Yates v. Royal Ins. Co.*, 200 Ill. 202.—Ed.

duress and where a protest would have been available to correct the difficulty and to stop the payment of the money, then it would be necessary, I take it, that the protest should be made.

Now, those are the facts in this case and they⁹ are in a very narrow compass, and we have to look, of course, at the condition of the parties at the time this illegal contract was made. It does not detract from its illegality that it was not made under duress. It is the other principle of law, that whether it was a voluntary or involuntary payment, and there being no duress, can it be recovered back in this common-law case. I can't see, if I am right, that there is any question here for the jury; that there can be anything said about a doubt as to whether or not there was duress. It is all a question of law and it is one-sided. Of course, there is no dispute here, that is to say there is no contention only upon the question of what that evidence proves as a matter of law, and so I am inclined to hold that there was no duress shown by this evidence at the time, practiced by this defendant company upon the plaintiff at the time of the execution of the contract in evidence when the plaintiff had a grounded service telephone in his place of business, which he had had for several years and I feel quite positive that the evidence here does show that their grounded service was becoming worse all the time, that is, the interference was greater as time went along and I think the best evidence of that fact is not the evidence of the people who used the wires, but it is the testimony of the general manager of the telephone company to the fact that the metallic telephone service has been increasing as the years have gone by; since the time it became practicable to install this metallic circuit service that the grounded service has decreased so that today it would be one of the hardest things to find in the city of Chicago, unless you knew just where to go, a grounded service 'phone.

Mr. HOLT: I only want to interrupt to call your honor's attention to the fact that the defendant's evidence on that subject has not been put in.

The COURT: I am talking about the evidence that is in and

you must remember, Mr. Holt, when you make the motion, you admit it is all true, and I am only judging from the evidence. I want to say another thing; I am not going to consider myself bound by the conclusion I have come to. While I shall instruct the jury and so far as the trial of this first case is concerned, it will be practically ended, still it is a question of great moment, as I said before, and I am quite sensible of its importance and it impresses me, and I don't feel like shifting the duty that I owe to the parties here, to come to a right conclusion and I take it that you will make a motion for a new trial and if you do, I want both of you to prepare briefs so that I may give the case further careful and protracted examination and then after I have examined those briefs, I will hear you orally and I may give you a new trial.

(Opinion rendered August 24, 1906.)

HOLDOM, J.:—

This cause is now before the court on a motion for a new trial from a directed verdict. On the motion to direct a verdict three days of oral argument was indulged. On the motion for a new trial 300 printed pages of brief and argument have been suffered, and plaintiff asks and defendant fore-shadows a request for further oral argument. In this condition of the record the court feels impelled, at the risk of a possible criticism of such action being arbitrary, to deny both parties the privilege of further discussion.

The Chicago Telephone Company is a public-service corporation engaged in the telephone business. It is an Illinois corporation, and as such derives its rights and powers to transact its business within the city of Chicago in virtue of an ordinance of the common council passed January 4, 1889. This ordinance required defendant to file with the city clerk a schedule of its charges, and provided that such schedule rates should not be increased during the time limited in the ordinance, viz.: twenty years. That part of the schedule pertinent here is as follows: "Within the blue lines on the map of Chicago attached hereto and made a part hereof we charge

\$125 per annum for telephone instruments connected by wire with our exchange for the business use of the lessee and his employes alone.”

Plaintiff is a corporation under a charter granted it pursuant to the Illinois statutes on “Corporations,” and is engaged in the glass business, with its principal office in Chicago within the blue lines of defendant’s schedule last quoted.

At the time of the passage and acceptance of the city ordinance, *supra*, defendant operated its telephone service in Chicago by what is known as “grounded service lines.” One of such telephones was installed and in operation in plaintiff’s Chicago office, for which it paid at the schedule rate of \$125 per annum. At the time of the original installation of plaintiff’s telephone and the passage of the 1889 ordinance, the grounded service was the only one in common use in Chicago. In the course of time American ingenuity, responding to new demands and necessities, the metallic circuit method was invented. This new device overcame somewhat and minimized the difficulties encountered in the operation of the grounded lines by leakage of electric current and interference with the transmission of sound over the wires, occasioned by contact with foreign substances, such as gas pipes, electric light poles, and other inductive disturbances. Plaintiff, having suffered somewhat from an impairment of service over its telephone, and having learned of the improved method of metallic circuit service, applied to defendant for its installation in the place of its grounded service. Defendant refused to install the metallic circuit service for plaintiff for a sum less than \$175 per annum. This condition being communicated to plaintiff’s general manager, he said, “If that was the best we could do, to get it by all means,” and the contract was closed at the rate of \$175 per annum. This action is brought to recover the excess between the ordinance and the contract rate paid by plaintiff for a period of nearly five years.

Upon the trial the basis of the right to recover was grounded on the doctrine of duress. Such duress, it is contended, arises by reason of the inequality of the parties to the contract and the necessities of the plaintiff; that a metallic circuit service

telephone was imperatively needed to conduct and efficiently carry on its business; that defendant, a public utility corporation, was the only one who could furnish what was needed, as it has a practical monopoly of the telephone business in Chicago; that defendant was bound to supply such improved service telephone at the ordinance rate, and that plaintiff is not chargeable with knowledge of the ordinance regulating charges for telephones.

The contract at the \$175 rate was entered into without any protest or complaint, other than a naturally expressed desire to procure a lower rate, if possible. Four times each year thereafter payments were made by plaintiff of a quarter of the annual contract charge without protest or complaint.

The evidence clearly establishes that plaintiff's grounded service telephone was reasonably efficient at and before the time of the change to the metallic circuit. Complaints were made of a buzzing and mumbling in the 'phone, and of difficulty in getting telephone connections, but when interrogated about these matters on cross-examination, the same witness admitted that there was always trouble, more or less, both before and since the metallic circuit was installed. Most of the trouble was with the busy signal—a buzzing of no uncertain sound, recognized readily by all users of telephones—but admits that when connection was once secured the talk was readily understandable.

By the ordinance defendant was obligated to furnish the improved service of metallic circuit at the ordinance rate, \$125, and the exaction of \$175 was, as to the excess of \$50, unwarranted, and a sum to which in law the defendant was not entitled. Such is the logical deduction from the decisions in *Chicago Telephone Co. v. Illinois Manufacturers Association*, 106 Ill. App. 54, and *People ex rel. v. Chicago Telephone Co.*, 220 Ill. 238. Neither the questions of duress in the making of contracts at a greater rate than limited by the ordinance, nor the right to sue and recover such excess were involved or decided in these cases. Any expressions in these opinions susceptible to a contrary construction are clearly *obiter*.

It appears from the opinion in the case of *Chicago Tele-*

phone Co. v. Illinois Manufacturers Association, supra, that defendant attempted to justify its exactions of contracts of the same general character as the one in evidence here, upon the claim that the limitation as to tariff contained in the city ordinance had no application to the subsequently invented improved metallic circuit—a claim effectually disposed of in that case against defendant, and as effectually settled against defendant in *People ex rel. v. Chicago Telephone Co., supra*; the first being a bill to reform certain contracts in this particular by making them conform to the ordinance rate in place of the exacted excess rate; the second, a *quo warranto* proceeding into which defendant injected the question by a plea in bar, which was held to be obnoxious to a demurrer, the court saying, p. 250: “Under the ordinance the defendant can not be required to adopt improvements in the service or equipment, or to keep up with the general progress in the business, but if it sees fit to adopt improvements and furnish a better grade of telephone service, it can only have the benefit of the ordinance granting it the right to use the public streets by complying with the terms of the ordinance and not increasing the rates.”

It is undoubtedly true that both parties, at the time of the making of the contract for the metallic service, were of the opinion that defendant had the right to exact the terms it did for the improved service it thereby contracted to supply. Nothing was said or done at this time by defendant which gives color to the claim that plaintiff acted under duress in executing the contract. The very absence of all discussion upon the relative rights of the parties, the failure to challenge defendant's right to demand compensation in excess of \$125, plainly inhibit any assumption that plaintiff in executing the contract was impelled thereto by duress. All the steps taken leading up to its execution seem to have been voluntary. The defendant in the first instance was approached in relation to the matter by plaintiff; the negotiation was opened by it. The matter was concluded without protest on the part of plaintiff and without any threat on the part of defendant to disturb the existing telephone service then in operation in

plaintiff's place of business. Nor does the evidence disclose any immediate necessity for the metallic circuit service, the grounded service being in the same working order in which it had been for some time previous. There was no change in plaintiff's business or the manner of its conduct necessitating an immediate abandonment of the grounded service. It was usable and practically efficient.

A careful examination of the many authorities cited fails to disclose any case held to constitute duress, which when applied to the facts here justifies the application of that doctrine. There are many definitions of what constitutes duress to be found in the books. That by Judge Cooley is in keeping with his high reputation: "Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will." *Hackley v. Headley*, 45 Mich. 569.

There must be present a consciousness of the demand being unlawful. Surely there is nothing in the evidential facts or the disclosures appearing in the cases in 106 Ill. App. and 220 Ill., heretofore cited, from which an inference can be drawn that defendant or its officers had any consciousness of the demand made being unlawful. It is admitted that plaintiff had none, and the trend of the authorities is to the effect that both parties must have a consciousness of the demand made being unlawful at the time, in order to constitute an acquiescence in such demand duress. But it is said that the inequality of the parties, the power of defendant, by reason of its monopoly of the telephone system, to compel a compliance with its demands, is of itself duress. If plaintiff's attitude rested upon legal authority, can it be said there are any facts upon which the law may operate? As before said, there was no immediate demand for the change, or threat to deprive plaintiff of its fairly efficient grounded service telephone. Plaintiff made no claim that the law vested him with a right to metallic circuit service at the existing rate. Nothing was said or done which by the most liberal construction can be held to have even tended to deprive plaintiff of the exercise of its free will. As in *Siegel v. Schueck*, 67 Ill. App. 296, it was a case of tame submission, without protest or even complaint.

Following upon the execution of the contract for metallic circuit service and its establishment upon the premises of plaintiff, came the quarterly payments made by plaintiff to defendant without protest of any character or suggestion that defendant was receiving more than its due. No discussion or contention of any sort about these payments. No question ever appears to have been raised by either party during the period of nearly five years, in which were annually paid \$50 in excess of the ordinance rate. Is there room for dispute that all these payments were voluntary, with knowledge imputable to plaintiff of its rights and the envioning conditions?

Cincinnati v. Gas Light & Coke Co., 53 Ohio St. 278, is the case of a public-service corporation, in which it was held that although excess payments could not be exacted in the future, yet excess payments voluntarily made in the past could not be recovered back. While the cases are not exactly parallel, the principle involved is the same. A citizen would have no greater right than the municipality. The city's need for gas was just as imperative, if not more so, than that of the citizen, and the only source of supply was the defendant gas company. The decision rested on the payments being voluntary.

The trend of the rule established by the decisions in this jurisdiction is that money voluntarily paid, without protest and where there is not present the element of duress, cannot be recovered back, where it appears that the parties either knew or were chargeable with knowledge of their rights and of the unlawful exaction at the time of payment. This is the rule in tax and water and gas cases without exception.

Elston v. Chicago, 40 Ill. 514, was a special assessment, which the court held was without the power of the council to make and was void. Yet the payment, though after judgment, was held to be voluntary, because there was neither precept nor execution through which collection could be enforced. The decision of the court was not grounded—as contended by plaintiff—on the fact that the payor's property had been greatly benefited by the improvement made. This fact was referred to only incidentally, but not as varying the

rule of law, for the court said: "No case can be found where money has been voluntarily paid with a full knowledge of the facts and circumstances under which it was demanded, which holds that it can be recovered back upon the ground that the payment was made under a misapprehension of the legal rights and obligations of the party paying, and it is invariably held that a payment is not to be regarded as compulsory unless made to relieve the person or property from an actual or existing duress imposed upon him by the party to whom the money is paid, and such is the tenor of all the cases cited by appellant. * * * No well-considered case anywhere has proceeded upon different principles." *Conkling v. Springfield*, 132 Ill. 420; *Preston v. Boston*, 12 Pick. 13.

Illegal fees paid to a county clerk, being held to be voluntary payments made without protest, were held not recoverable back in *Village of Morgan Park v. Knopf*, 199 Ill. 444. The fees sought to be recovered were paid for issuing tax deeds, the parties here were not on an equality, the tax deeds could not be procured elsewhere, and the village was entitled to them as a matter of law, without payment of the exaction held illegal. The court said: "There was no fraud or mistake of fact, and if there was any mistake, it was one of law, the money having been voluntarily paid under such circumstances no action would lie to recover it back. This rule, which is well settled as between individuals, has been extended to municipal corporations under similar circumstances."

Stover v. Mitchell, 45 Ill. 213, was a case where payment was made in the mistaken belief—of law—that an execution was a lien, when in fact it was not. On suit to recover back payment the court held "that in order to render a payment compulsory such a pressure must be brought to bear upon the person paying as to interfere in some way with the free enjoyment of his rights of person or property. * * * In this case the sale was not advertised * * * and Stover was under no necessity of hasty action, and would have had several weeks in which to sue out an injunction." So here, plaintiff evidently mistook his legal rights under the ordinance, and in ignorance of the law affecting the contract,

freely, tamely and unprotestingly entered into it, and in faith of it uncomplainingly and voluntarily continued for nearly five years to pay the excessive contract price, a condition from which it could have been relieved at any time by protest, which, if unavailing, then by the aid of an injunction and a bill to reform the contract, as was done in *Chicago Telephone Co. v. Illinois Manufacturers Association*, *supra*.

Yates v. Royal Insurance Company, 200 Ill. 202, is a case where the doctrine of voluntary payment was carried to its extremity. Yates was state superintendent of insurance, and the Royal Insurance Company, a foreign insurance company doing a fire business in Illinois. An Illinois statute of 1899, as a condition precedent to a foreign insurance company's doing business in this state, required it to pay two per cent. upon the gross amount of premiums collected by it during the previous year. This act being declared unconstitutional, suit was brought against Yates in his official capacity to recover back the money so paid, which Yates admitted he still held to await the result of the litigation. The proof showed that the money was paid under threat by Yates as state superintendent of insurance to exclude and prevent the company from doing business in this state. The right of recovery, however, was denied on the theory that the payment was voluntary, and despite the contention that the money was extorted by the power of the state, which it was futile to combat, and that the parties were not on an equality or equal footing. Here there was lacking a consciousness of illegal demand, because all parties believed at the time the law was valid; that therefore the mistake was one of law and not of fact, and the trial court, holding to the contrary, was reversed.

Numerous other cases might be cited, but these are reasonably sufficient and conclusive on this point. The converse of the proposition is well illustrated by the case of *City of Chicago v. Northwestern Mutual Life Ins. Co.*, 218 Ill. 40. Here the insurance company had acquired title to certain buildings, from which the city threatened to cut off the water supply on a claim against former owners for water furnished the buildings. Water in the buildings was a necessity. It could only

be procured from one source, the city. The payment sued to recover back was made on the threat of the city to disconnect the water supply, and under protest. It was held, the claim being no lien upon the property nor an obligation chargeable against the payor, and the city having the power to put in execution its threat, the payment was adjudged to have been made involuntarily under duress and with protest, and recoverable back—essential elements and conditions wholly lacking here.

Upon like legal theories and under similar conditions payments were adjudged to have been made under duress and involuntarily in *County of La Salle v. Simmons*, 10 Ill. 513, and *Bradford v. Chicago*, 25 Ill. 411.

It is next contended by plaintiff that the payments sought to be recovered back were made in ignorance of a material fact, which fact is alleged to be the ordinance limiting the tariff on telephones within the blue line district to \$125 per annum. This raises the question whether the ordinance of 1889 is a law in the sense that ignorance of it will not excuse.

In *Marshall v. Coleman*, 187 Ill. 556, it was said: "Ignorance of law which will not excuse, is ignorance of the law of one's country or state, but the laws of foreign countries or other states are facts." This may be conceded to be a correct statement of the law. It is also true that the courts do not ordinarily take judicial cognizance of foreign laws or municipal ordinances. But municipal ordinances which are general in their application and define the rights of citizens generally, under certain specified conditions, and when of such a nature that it may be invoked by all citizens desirous of availing of its provisions, then it is a general law, binding on all citizens who by their actions bring themselves within its purview. It is as binding within the municipal limits as the statute of a state is within the bounds of such commonwealth.

The supreme and appellate courts of this state have expressly held this ordinance to be a law in the two cases first referred to, in which the defendant here was a party, and in which the validity and binding force of the ordinance as a municipal law was before these courts for construction. That

the ordinance is not a mere contract or agreement between the city and defendant, but something more, is evident from the fact that in *People v. Chicago Telephone Co.*, 220 Ill. 238, it was held that it applied to annexed territory, immediately upon annexation. It operates upon the public of the municipality generally, whatever its extent, during the term of twenty years to which it is limited. The council derives its powers from the legislature, and where ordinances of a general character are passed within the limitations of such granted power, they are as much laws as they would be if passed by the legislature had such power not been delegated to the council.

Much of the argument in behalf of plaintiff has been directed upon the theory of the higher duty resting upon defendant as a public utility corporation, in virtue of the restrictions upon its natural right and power to contract or be contracted with under this ordinance—a municipal law as binding and conclusive as any other law—ignorance of which is ignorance of law and not of fact. No rights can be predicated upon a claim of ignorance of this municipal law.

But it is urged that the schedules of tariff furnished by the defendant in compliance with the ordinance and filed with the city clerk are no part of the ordinance and do not appear in the municipal code. Even so, that fact—if it is a fact—is of no controlling importance and has no bearing on the issues here under the evidential facts, for upon looking at the ordinance itself we find that section 6 provides, among other things (see page 2, plaintiff's first brief): "Said company during the term for which this ordinance is granted shall not increase to its present or future subscribers the rates for telephone service now established."

Knowledge of this provision of the municipal statute being imputable to plaintiff, and it having a telephone at the time of making the contract for the metallic circuit service, it follows as a matter of law that it had knowledge of the rate for which it was entitled to the improved service, and therefore in executing the contract and in payment at the contract rate, it acted voluntarily, from the binding force of which it can-

not escape by a plea of ignorance of the ordinance. Consequently testimony tending to prove such ignorance is not material and is inadmissible. It is a complete answer upon any theory as to the effect of the schedules filed, that reference to them would not have furnished any information not found in the very letter of the ordinance.

Capital Gas & Electric Light Co. v. Gaines, 20 Ky. L. Rep. 1464, 49 S. W. 462, arose in Kentucky, which is colloquially known as a "Code State." It was expressly held as a matter of law in that forum that money paid through mistake of either law or fact may be recovered back. This is contrary to the law in this jurisdiction. The Kentucky court grounded its decision on the following *dicta* in *Ray v. Bank*, 13 B. Mon. 510, quoted with approval in *Louisville & N. R. Co. v. Hopkins*, 87 Ky. 613: "Upon the whole we would remark that whenever by a clear and palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid, without cause or consideration, which in law, honor or conscience was not due and payable, and which, in honor or good conscience ought not to be retained, it was and ought to be recovered back." Many cases cited to like effect are subject to the same criticism.

The quotation from *Marshall v. Coleman*, 187 Ill. 556, on page 122, plaintiff's reply brief: "Ignorance of law, which will not excuse, is ignorance of the laws of *one's own* country or state," may consistently be amplified as a correct legal proposition suited, to this case by adding "or city." Such municipal laws being those ordinances which are public as distinguished from private, and of a general character in their operation upon the public within the limits of the municipality, and which may be invoked by all citizens at their will, without discrimination and upon equal terms. Such is the character and scope of the ordinance of January 4, 1889.

Plaintiff also predicates its right of recovery in virtue of the maxim *ex æquo et bono*. This maxim, in its practical application, is one of equity. The remark of Judge Story in his work on Equity Jurisprudence, sec. 965, is forcefully applicable to the facts of this case. "Indeed," says this jurist,

“it is impossible to suppose that, in a country professing to have an enlightened jurisprudence, obligations and trusts in regard to property binding in conscience and duty, and which *ex æquo et bono* the party ought to perform, should be left without any positive means of securing their due fulfillment, or that they might be violated without rebuke or evaded with impunity.”

Defendant had no right or power to exact more than the ordinance rate, in morals and in law, in honor and in good conscience. Such exaction was unwarranted and in all conscience should be returned. Still many rights are impossible of enforcement by reason of long acquiescence or for a failure to protest at the appropriate time. None of the authorities cited on this contention in behalf of plaintiff, when weighed with the facts, are of controlling force here.

Moses v. Macferlan, 2 Burrows, 1005, is in some respects a remarkable case. There Macferlan induced Moses to endorse certain notes, without consideration and with the distinct understanding in writing that he should not be held to the responsibility consequent upon his act of endorsement. In violation of this compact, Macferlan sued Moses, and in the court of conscience, under a decision of the commissioners, they holding that Moses, admitting his execution of the notes, could not invoke the circumstances of their procurement as a defense to the action, Moses paid the amount claimed into court. On Macferlan's taking the money out of court, Moses sued him to recover it back as money had and received to his use, as money which *ex æquo et bono* did not belong to Macferlan. Here was the grossest kind of actual fraud and base deception. No mistake of either law or fact, but an unconscionable swindle, to redress which a court of law gave that ultimate relief which a court of conscience had refused—a remarkable case of legal contradictions. While in many of the cases expressions may be found seemingly in point, when analyzed they are as impotent as legal factors here as *Moses v. Macferlan*, *supra*.

The application of equitable principles found in the English cases at common law arise from the fact that by the English

judicature act the rule of judicial interpretation is "that when the rules of the common law conflict with those of equity, every court is to give effect to the latter," and like judicial interpretation at common law at an earlier date rests on the fact that many of the strict rules of the common law were materially modified by the common-law Procedure Acts of 1852-4. Authorities from so-called "Code States," where the distinctions between common law and equity causes are abolished, are out of harmony, for that reason, in this forum, where the distinctions of common law and equity are still preserved. It is evident from the Yates and other cases in this state, that the strict rules of the common law controlling this case have in no way been modified either by statute or judicial construction.

It may appear to some an anomalous condition that money which in conscience ought not to be retained cannot be recovered back in an action at law; but it is of common occurrence, in this jurisdiction, that actions may be maintained to enforce rights in the equity branch of the court, where the common-law branch of the court is impotent to afford relief. Notwithstanding relief, in my judgment, cannot be obtained in this form of action, in this and kindred cases, yet if a court of equity acquires jurisdiction in such cases to grant relief, the maxim *ex æquo et bono* may receive an additional exemplification.

The plaintiff's motion for a new trial is overruled, with a judgment upon the verdict as directed, and against the plaintiff for costs.¹

¹ The above case is now pending in the appellate court on appeal, but on account of the importance of the case, and the number of similar cases pending it is deemed advisable to publish the above opinions. For note on question of whether excess payments to public service corporations are voluntary see *Illinois Mfr's Ass'n v. Chicago Telephone Co.*, 1 Ill. C. C. 119, *supra*.—Ed.

(Circuit Court of Cook County. In Chancery.)

Elgin National Watch Company

vs.

Max C. Eppenstein, et al.

(December 21, 1892.)

1. **CORPORATE NAMES—RIGHT OF ONE ILLINOIS CORPORATION TO ENJOIN THE RECORDING OF A CERTIFICATE OF INCORPORATION OF ANOTHER ILLINOIS CORPORATION OF A SIMILAR NAME.** Certain of the defendants procured from the secretary of state a final certificate of incorporation of "The Elgin National Watch Case Company, of Elgin, Illinois," but before this certificate was recorded in the office of the recorder of deeds of Kane County, Illinois, as required by statute, "The Elgin National Watch Company" and the "Elgin Watch Case Company" obtained a temporary injunction restraining the recording of the certificate of organization of "The Elgin National Watch Case Company, of Elgin, Illinois." Upon motion of defendants to dissolve the injunction theretofore granted, *held* that the names were so similar that confusion would result, and that the defendants should be enjoined from procuring to be recorded in the recorder's office the certificate of incorporation of "The Elgin National Watch Case Company of Elgin, Illinois."
2. **PARTIES—UNORGANIZED CORPORATION.** Where the certificate of final organization of a corporation has not been filed in the recorder's office as required by statute, it is not necessary to make such corporation a party defendant in a bill to enjoin the recording of the certificate, as by so doing the complainant would admit that it was an existing corporation.
3. **POWER OF ILLINOIS CORPORATION TO PREVENT THE ORGANIZATION OF ANOTHER ILLINOIS CORPORATION OF A SIMILAR NAME.** The legislature has by implication provided that an Illinois corporation may, by proper legal proceedings, prevent the organization of any other corporation under the laws of this state, with the same or a similar corporate name, when the consent thereto of such existing corporation has not been obtained.
4. **TRADE NAMES—PROTECTION OF.** When parties have, by their mode of doing business, and by the quality of their products, and, by selling and delivering to the public articles as valuable as represented, built up under a chosen name a reputation which is of great value, they should be protected in the use of that name; and the protection of the public in preventing any other persons from assuming a like or similar name is at the same time a protection of the parties.

5. TRADE NAMES—UNFAIR TRADE. The words "Elgin" and "National" and "Watch" are general or geographical words or names that can not be appropriated to the exclusion of others; but they may be so used when taken together or in connection with certain manufactured articles as to create and establish a special signification, and in the use of those words, or any or either of them, in such connection, and with such special signification, the parties entitled thereto should receive protection from the courts.

Motion to dissolve injunction. Circuit Court of Cook County. In chancery. Heard before Judge Oliver H. Horton.

For statement of facts see opinion.

W. H. & J. H. Moore & Purcell, and Banning, Banning & Payson, for complainants.

D. J. Wile, and Bond, Pickard & Adams, for defendants.

HORTON, J.:—

These cases are now before the court upon motions to dissolve the injunctions heretofore granted in said causes respectively. One of these injunctions restrains the defendants as follows: "From proceeding to complete the organization of 'The Elgin National Watch Case Company' of Elgin, Illinois,' by recording in the office of the recorder of deeds of Kane county, Illinois, the final certificates of organization thereof heretofore issued by the secretary of state of the state of Illinois; and you, the said Charles A. Miller, recorder of Kane county, Illinois, from receiving, filing or recording said final certificate in your office as such recorder or otherwise; and you, the said Max C. Eppenstein, Sol C. Eppenstein and Thomas W. Duncan from in any manner using or attempting to use the name 'The Elgin National Watch Case Company, of Elgin, Illinois,' in the business of manufacturing or selling watches, watch cases, jewelry, or parts thereof or materials therefor, or any other name so nearly resembling the complainant's corporate name, 'Elgin National Watch Company,' as to be calculated to mislead or deceive, and from in any manner violating, infringing upon or interfering with the complainant's corporate name aforesaid." The other injunction is substantially the same.

It is urged by solicitors for defendants that the action of the secretary of state in granting the final certificate to "The Elgin National Watch Case Company, of Elgin, Illinois," is final and conclusive. The opinion of the supreme court of this state, cited in support of this position, being the *Illinois Watch Case Company v. Pearson*, 140 Ill. 423, 31 N. E. 400, as I read it, does not sustain this position.

The final certificate must be filed for record as required by the statute before the corporation is fully organized. "It is a condition precedent to the power of the corporation to proceed to business." *Loverin v. McLaughlin*, 46 Ill. App. 373, and cases there cited.¹

The certificate of incorporation or license issued by the secretary of state to "The Elgin National Watch Case Company, of Elgin, Illinois," not having been recorded as required by the statute, that company is not a corporation *de jure* or *de facto*. As to the questions involved in the cases now before this court, the case of *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67, 4 Am. R. R. & Cor. Rep. 527, 27 N. E. 596, is cited as being in conflict with this view. That case was heard before me, and the supreme court in affirming the opinion of this court does not decide as is argued.

It is objected also by solicitors for defendants that "The Elgin National Watch Case Company, of Elgin, Illinois," is not made a party defendant to this cause, and that such company is a necessary party, and that this court can not entertain jurisdiction to determine as to the validity of its organization or its power to proceed to business in the absence of such company as a party. The complainants could not make that company a party defendant as a corporation, without by so doing admitting, for the purpose of these cases, that it is an existing corporation. *People v. Rensselaer & Saratoga R. R. Co.*, 15 Wendell, 113. That is one of the issues presented for the court to determine.

It is also urged that this court has no jurisdiction of the defendant Charles A. Miller, recorder of Kane county.

¹ Affirmed 161 Ill. 417.—Ed.

A writ of injunction of this court operates throughout the state; Starr & Curtis' Statutes (first edition), chap. 37, sec. 68.

And besides the recorder has filed his answer and submitted himself to the jurisdiction of this court, stating, "That he shall in all respects obey said injunction of this honorable court, and all other orders and directions which it may make in the premises respecting this defendant." The jurisdiction of the court will be maintained. *Vermont Farm Machine Co. v. Marble, Commissioner of Patents*, 20 Fed. 117.

Of the two bills before the court one is filed by "Elgin National Watch Company," and the other by "Elgin Watch Case Company." The name complained of is, "The Elgin National Watch Case Company, of Elgin, Illinois."

The place of business and principal office of the two corporation complainants is in Chicago, Cook county, and the principal office and place of business of the proposed corporation is at Elgin, Kane county, Illinois.

On behalf of complainants it is urged that the use of the name, which it is claimed by the defendants they have the right to use, namely, "The Elgin National Watch Case Company, of Elgin, Illinois," will create confusion in business circles and among their customers, and cause great damage to the complainants, and especially the complainant, The Elgin National Watch Company.

These are all Illinois corporation names. It is held by the supreme court of this state in *Illinois Watch Case Company v. Pearson*, 140 Ill. 423, 31 N. E. 400, that sections 2 and 50 of the Illinois statute, as to corporations, should be construed together, because, although embraced in different acts, they were passed at the same session of the legislature, etc. Section 2 applies to the original organization of corporations, and section 50 to the changing of names of corporations. In the section first named it is provided that "no license shall be issued to two companies having the same name," and in section 50, that "no name shall be assumed or adopted by any corporation similar to or liable to be mistaken for the name of any other corporation organized under the laws of this state, without the consent of such other corporation." Aside-

from and independent of the general rule laid down by the courts, the legislature has by this statute by implication provided that an Illinois corporation may, by proper legal proceedings, prevent the organization of any other corporation under the laws of this state, with the same or a similar corporate name, when the consent thereto of such existing corporation has not been obtained.

The protection of the public, as well as the rights of corporations or individuals, is to be considered by the court. It is clearly in the interest of the public that no corporation should be authorized, having the same name as a pre-existing corporation, and also that no name should be assumed by a corporation similar to or liable to be mistaken for the name of any other corporation organized under the laws of this state.

Putting the word "The" at the commencement of the name and the words "of Elgin, Illinois," at the conclusion, does not materially tend to prevent confusion. In ordinary use it would be called "Elgin National Watch Case Co."

A large number of affidavits have been filed in these cases, from which it appears that confusion has arisen in regard to these names. These affidavits also tend to show actual damages to the complainant, The Elgin National Watch Company.

It appears that the defendants are seeking to establish or incorporate "The Elgin National Watch Case Company, of Elgin, Illinois," as the successor of "Illinois Watch Case Company," whose watch case factory has been for some time located at Elgin. It also appears that the "Illinois Watch Case Company" sought to change its name to "Elgin Watch Case Company," but that before such change of name was completed the complainant, "Elgin Watch Case Company," was incorporated under the general laws of this state, and thereupon the secretary of state refused a license to change the name of the "Illinois Watch Case Company" to the "Elgin Watch Case Company," presumably under the restriction contained in section 50 of the statute as to corporations above quoted, viz.: "That no name shall be assumed or adopted similar to, or liable to be mistaken for, the name of any other corporation."

Some of the defendants, or those interested with them, thereupon applied to the supreme court of this state to obtain a writ of *mandamus* by which they sought to compel the secretary of state to issue the certificate of the change of name above indicated. The supreme court refused to so command; and it is the opinion of the supreme court in that case, cited above as "*Illinois Watch Case Company v. Pearson.*"

The fact that defendants are so anxious and so persistent in their determination to adopt this or some similar name may be regarded as an evidence that they think it is valuable and desirable. If valuable and desirable, why? Is it not reasonable to presume that it is, in part, at least, because the complainant, the "Elgin National Watch Company," has made it so, when connected with watches or parts thereof?

When parties have, by their mode of doing business, and by the quality of the product of their manufactories, and by selling and delivering to the public articles as valuable as represented or promised, built up under a chosen name, a reputation which is of great value, they should be protected in the use of that name.

The protection of the public in preventing any other persons from assuming a like or similar name is at the same time a protection of such parties. A trade-name, like a trade-mark, may be of great value, and that value may have been entirely created by the parties who seek to be protected in its use.

The words "Elgin" and "National" and "Watch" are general or geographical words or names that can not be appropriated to the exclusion of others; but they may be so used when taken together or in connection with certain manufactured articles as to create and establish a special signification, and in the use of those words, or any or either of them, in such connection, and with such special signification, the parties entitled thereto should receive protection from the courts.

A trade-name may not only be as valuable as is a trade-mark, but it will be protected the same as will a trade-mark. *Gray v. Taper Sleeve Pulley Works*, 16 Fed. 436.

The principles underlying the decisions supporting the views here expressed are: first, the injury to the public by

leading them to suppose that the goods of one are the goods of the other, and, secondly, the injury to the owner of the trademark, or name, by the diversion of his trade into other channels, by the belief of the public that they are obtaining his goods. *Farmers Loan & Trust Company v. Farmers Loan & Trust Company of Kansas*, 21 Abbott's New Cases, 104.

The rule as to trade-names herein stated applies to corporations the same as it does to individuals.

That confusion would follow if "The Elgin National Watch Case Company, of Elgin, Illinois," should be incorporated and continue to transact business in that name, seems to me certain, and is supported by numerous affidavits. As an evidence to my mind that such confusion would follow I may say that I found it necessary to write these several names down and thus impress them clearly upon my mind to prevent confusion in considering these cases. That damage to the complainant watch company would result seems to be more than probable.

From these conclusions it follows that the motion to dissolve the injunction must be denied.

NOTE.

For an editorial note upon the right of one corporation to restrain the use of its corporate name by another corporation see pp. 463 *et seq.*, *supra*.—Ed.

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ADULTERY.

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ASSIGNMENT.

1. **ASSIGNMENT OF CHOSSES IN ACTION AT COMMON LAW.** At common law a chose in action, unless a negotiable instrument, was not assignable, unless the debtor assented to the assignment and promised to pay the assignee. *Silverstein, for use of Brewer and Company v. Gresheimer*, 471.
2. **SAME—MODERN RULE.** Under the modern authorities the general test as to whether a chose in action is assignable is whether or not it would survive and pass to the personal representatives of a decedent assignor if no assignment had been made. If it would so survive, it may be assigned so as to pass the interest assigned to the assignee; if it does not so survive, it is not assignable either at law or in equity. *Idem*.
3. **TRUST DEED—ASSIGNEE OF SUBJECT TO EQUITIES.** The assignee of a mortgage or trust deed takes it subject to existing equities between mortgagor and mortgagee. *Chetlain et al. v. De Grazie, et al.*, 567.
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1. **ORDINANCE REQUIRING IDENTIFICATION NUMBERS ON AUTOMOBILES, VALIDITY OF.** An ordinance of the city of Chicago requiring all automobiles operated in the city to display for identification, numbers and letters as provided in the ordinance, *held*,

upon an application for an injunction against its enforcement, to be a valid exercise of the general police power of the city, in connection with the express power to regulate the use of the streets. *Slade, et al. v. City of Chicago*, 520.

2. **AUTOMOBILES—POLICE POWER OF CITY OVER.** The automobile is a class unto itself and no reason can be perceived why the police power shall not be exercised as to any specific class. And it is a proper exercise of the police power and of the power to regulate the streets, for the city council to place them under such restrictions as will enable the police to enforce against them the penalty for exceeding the speed allowed by the city ordinance, and also to enable the police to enforce other restrictions, such as in regard to lights, the observance of the laws of the road by such vehicles, etc. *Idem.*

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1. **BAIL—APPLICATION FOR—AFTER VERDICT OF GUILTY.** Under the Illinois statute all persons are entitled to bail at any time before conviction, except where the offense is a capital one. *Held*, that where the defendant was indicted for receiving stolen property the verdict of a jury finding the defendant guilty was a conviction, even though a motion for a new trial was pending, and that such defendant was not entitled to be released on bail. *People v. Davis*, 528.
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1. **CONTRACTS—UNION LABOR.** A private individual has the undoubted right to insert in his agreements that none but union labor shall be employed in carrying out the contract. *Building Trades Council v. Board of Education of the City of Chicago*, 378.
2. **SAME—BOARD OF EDUCATION.** The board of education being a public body cannot insert such a stipulation in its contracts from mere sentiment or caprice, unless such action would subserve the public interests. *Idem.*
3. **SAME—PUBLIC POLICY.** If the board should decide that it is to the public interest to insert in its contracts that none but union labor should be employed, or if the board should provide that none but union workmen should be employed upon the pay-roll of the board, no one can complain. *Idem.*
4. **ARBITRATION.** There is no such legal "controversy" between the parties upon the above facts as is contemplated by the act under which the submission is made. *Idem.*

BOARD OF TRADE.

1. **BOARD OF TRADE—RULES OF.** Neither the courts nor the legislature can interfere with the actions of the board of trade as to the control of its own floor or the discipline of its members, but the business transacted upon the floor of the board of trade is "affected with a public interest" to an extent which would authorize the legislature or the courts to prohibit such board from exercising any discrimination as to who shall receive its market quotations, or as to what telegraphic companies shall be allowed facilities for distributing the information to the public. *Public Grain & Stock Exchange v. Western Union Telegraph Company, et al.*, 548.
2. **RIGHT TO RECEIVE MARKET QUOTATIONS—ORDER OF THIRD PERSONS NO EXCUSE.** Where a telegraph company receives market quotations from the board of trade and the public are entitled to receive such quotations without discrimination, the court will compel the furnishing of such quotations to complainant even through the board of trade has issued instructions to the contrary. *Idem.*
3. **TELEGRAPH COMPANIES FURNISHING MARKET QUOTATIONS—WHETHER AFFECTED WITH A PUBLIC USE.** Where a telegraph company as incident to its regular telegraph business procures market quotations on the board of trade and circulates such quotations over "tickers," such incidental business is affected with a public use, and the quotations must be furnished to all alike without discrimination. *Idem.*
4. **BUCKET SHOPS—EQUITABLE AID.** Where the complainant seeks to compel the defendant to furnish it market quotations and it is made to appear that such quotations are desired for the purpose of conducting a "bucket shop" or any other illegal business, a court of equity will not lend its aid for any such purpose. But before relief is denied there must be proof of such fact and not mere suspicion. *Idem.*

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1. ASSIGNMENT OF CHOSES IN ACTION AT COMMON LAW. At common law a chose in action, unless a negotiable instrument, was not assignable, unless the debtor assented to the assignment and promised to pay the assignee. *Silverstein, for use, etc., v. Greshelmer*, 471.
2. SAME—MODERN RULE. Under the modern authorities the general test as to whether a chose in action is assignable is whether or not it would survive and pass to the personal representatives of a decedent assignor if no assignment had been made. If it would so survive, it may be assigned so as to pass the interest assigned to the assignee; if it does not so survive, it is not assignable either at law or in equity. *Idem*.

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CITIZENSHIP.

1. CITIZENSHIP—WHETHER NATIONAL OR STATE. The right of citizenship as distinguished from alienage is a national right or condition, and pertains to the confederate sovereignty of the United States, and not to individual states. *Soutter, et al. v. D'Auxy, et al.*, 364.
2. CITIZENSHIP—CHILD BORN OF FOREIGN PARENTS. The rule that a child born in a foreign country is a citizen of the country of her parents, is one confined to countries which derive their jurisprudence from the civil law and is not the rule in this country. *Idem*.
3. CONSTITUTIONAL LAW—CITIZENSHIP—WHAT CONSTITUTES—CHILD BORN OF FOREIGN PARENTS. The fourteenth amendment to the constitution of the United States provides that "all persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." Under this provision every person born within the dominion and allegiance of the United States, whatever the nationality of his parents, is a natural born citizen of the United States. *Idem*.
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COMBINATIONS AND MONOPOLIES.

1. PUBLIC POLICY DEFINED. By public policy is intended that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed a policy of the law or public policy in the administration of the law. *Taylor v. The Pullman Company*, 24.

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2. **COURTS CANNOT DECLARE THAT AGAINST PUBLIC POLICY WHICH THE STATE PERMITS TO BE DONE.** The courts cannot permit that to be declared against public policy which the state permits to be done. To permit the courts to declare that to be illegal and void which is authorized by the legislature of the state, would be to substitute the courts for the legislature. *Idem.*
 3. **PURCHASE OF PROPERTY OF COMPETITOR BY PULLMAN COMPANY NOT VIOLATION OF ANTI-TRUST LAWS.** While the purchase of the Wagner Company by the Pullman Company may have removed the latter's chief competitor, yet the right to contract in that respect as to service by sleeping and dining cars with railroad companies is open to all. The purchase or combination of the Pullman Company with the stock and property of the Wagner Company did not necessarily give the Pullman Company the power to raise prices or prevent competition in the business of contracting with railway companies for the use of sleeping cars and furnishing accommodations connected therewith, and such purchase is not a violation of the anti-trust acts of Illinois or of the United States act against restraint of trade and monopolies.—*Idem.*
 4. **MONOPOLIES AND COMBINATIONS, WHEN ILLEGAL.** It is not every combination that is prohibited by the anti-trust laws, or that is opposed to public policy. It is not sufficient to create an illegal monopoly, that the transaction challenged may tend to restrain competition or tend to create a monopoly. The transaction complained of must necessarily put the purchaser in the position where he can, if he desires, create a monopoly. *Idem.*
 5. **PUBLIC POLICY OF ILLINOIS AS TO MONOPOLIES.** From a review of the anti-trust statutes of Illinois and of the acts passed by the legislature in 1897 it would seem that the public policy of the state, of opposition to combinations and monopolies in Illinois has changed to a policy favoring combinations and monopolies. *Idem.*
 6. **COMBINATIONS AND MONOPOLIES—CONSTRUCTION OF LAWS REGULATING.** The laws of trade appear to be almost as irresistible as the laws of nature. There combinations are the evolution of trade and appear to be demanded by the present economic conditions. Such laws as the legislature deem it necessary to enact in that regard should be strictly construed and enforced in favor of the public; but the constitutional right to own property and contract with reference thereto, should not be infringed or abridged except in case where it is made clearly to appear that unless there is such interference, the public will be injuriously affected. *Idem.*
 7. **CONSTITUTIONAL LAW—CLASS LEGISLATION.** In 1897 the legislature amended section one of the act of 1891 by adding a proviso, that in the mining, manufacture or production of articles of merchandise the cost of which is mainly made up of wages, it shall not be unlawful to enter into joint arrangements of any sort the principal object or effect of which is to maintain or increase wages:
Held (1) That section one as amended was in effect an amendment of the General Incorporation Law, and operated as an amendment of some but not all of the charters of corporations incorporated under that law and therefore was prohibited by section 2, article 2, of the constitution of 1870.
(2) That section one as amended was unequal and partial

legislation forbidden at common law and in violation of the constitution of the state, and of the fourteenth amendment to the Federal constitution, which prohibits a state from denying to any person the equal protection of the laws. One judge dissenting upon the proposition that the entire section was void on account of the unconstitutional proviso. *People v. Richards & Kelly Manufacturing Company*, 171.

8. **STATUTES—REPEAL BY IMPLICATION.** In 1891 the legislature passed an act in reference to trusts and combines. In 1893 this act was amended by adding two new sections. On the same day the legislature passed an entire new act upon the same subject. *Held*, that the act of 1893 did not repeal the act of 1891, as such was not the intention of the legislature. *Idem*.
9. **CONSTITUTIONAL LAW—EXEMPTION OF BUILDING AND LOAN ASSOCIATIONS.** The exemption of building and loan associations from the operation of a law requiring corporations to make an annual report that they are not a party to a trust or combine is not an arbitrary classification and does not invalidate the law. *Idem*.

COMMON CARRIERS.

I.

WHO ARE COMMON CARRIERS.

II.

DUTIES OF COMMON CARRIERS.

I. WHO ARE COMMON CARRIERS.

1. **COMMON CARRIERS—TEAMING COMPANIES ARE NOT.** Persons carrying on a general contract teaming business, and owning horses and wagons suitable for the hauling of goods in and about the city of Chicago, who do such hauling for their customers under time contracts at a fixed price per ton, are not common carriers, and cannot be compelled to carry goods against their will. *City of Chicago v. A. M. Forbes Cartage Company*, *City of Chicago v. R. J. Mix Transfer Company*, 473.
2. **SAME—POWER OF CITY TO CONTROL AND LICENSE.** As the business of such teaming companies is not affected with a public interest, it is not subject to police control. *Idem*.
3. **PUBLIC CART—DEFINED.** A teaming company which carries goods within a city for certain customers under private contract at a fixed price per ton, and does not hold itself out as undertaking for hire to transport the goods of any person applying to them, is not a common carrier, and does not come within the meaning of a city ordinance regulating and licensing "public carts." *Idem*.
4. **CITY EXPRESS COMPANIES ARE COMMON CARRIERS.** City express companies carrying goods from one portion of the same city to another for all who choose to employ them are common carriers and can make no arbitrary, unjust or injurious discriminations between individuals in their dealings with the public. *Marshall Field & Co. v. Becklenberg*, 59.
5. **CITY EXPRESS COMPANIES MUST CARRY FOR ALL ALIKE UNDER ORDINANCES OF THE CITY OF CHICAGO.** Under the ordinances of the city of Chicago, city express companies cannot refuse to carry

or convey merchandise, goods, etc., tendered them to be carried within the city. *Idem.*

6. **THAT A STRIKE MAY RESULT NO EXCUSE FOR REFUSAL OF COMMON CARRIER TO RECEIVE GOODS.** It is not a sufficient excuse for a common carrier, a city express company, to avoid its duty to receive and transport goods, that if it accepts the goods and carries them, all its teamsters will go on a strike, and tie up the business of the city express company or common carrier. *Idem.*
7. **NO EXCUSE FOR REFUSAL OF ONE CARRIER TO CONVEY GOODS THAT OTHER CARRIERS ARE AVAILABLE.** That many other like carriers are available is no reason for a carrier refusing to convey goods, as the law is equal in its operation on all alike, and such other carriers if applied to might upon the same grounds refuse to serve. *Idem.*
8. **MANDATORY INJUNCTION AGAINST COMMON CARRIERS.** When complainants are frequent shippers and a continuous series of shipments is necessary in conducting their business, a mandatory injunction is the proper remedy to compel common carriers to perform their duties and carry goods tendered for transportation, since actions at law would result in a multiplicity of suits. *Idem.*

II. DUTIES OF COMMON CARRIERS.

1. **COMMON CARRIERS—ORIGIN OF DUTY OF.** The liabilities of common carriers were originally determined by the usages of trade, and the opinions of the judges predicated upon the obligations they assumed, and the nature of their business. *Public Grain & Stock Exchange v. Western Union Telegraph Company, et al.*, 548.
2. **COMMON CARRIERS—DUTY TO SERVE ALL—CONTRACT WITH THIRD PERSON NO EXCUSE.** A common carrier cannot refuse to carry for one person because another person does not desire him to, or because the carrier is under contract not to do so. *Idem.*
3. **RAILROADS—DUTY TO FURNISH FACILITIES.** A railroad company is under an obligation to furnish transportation to the public and to furnish all known appliances. It may construct its own cars and operate the same if it desires, or it may lease cars and contract for service to be rendered in connection with the running thereof, with any person or corporation it sees fit. *Taylor v. The Pullman Company*, 24.

COMMON LAW.

1. **PRINCIPLES OF.** The public welfare is the great and final test in matters at common law. *Public Grain & Stock Exchange v. Western Union Telegraph Company, et al.*, 548.
2. **CRIMINAL CODE DOES NOT REPEAL COMMON LAW.** The criminal code was not intended as a complete codification of the criminal laws; the common law remains in force except in so far as it is expressly repealed. *People v. Davis, et al.*, 217.
3. **CONSTITUTIONAL LAW—WHETHER NATIONAL COMMON LAW.** The constitution of the United States presupposed the existence of the common law, and to a limited extent the principles of the common law prevail in the United States as a system of national jurisprudence. *Soutter, et al. v. D'Auxy, et al.*, 364.

COMPENSATION OF PARTNERS. See *Partners*.

 CONSTITUTIONAL LAW.

1. **CITIZENSHIP—WHETHER NATIONAL OR STATE.** The right of citizenship as distinguished from alienage is a national right or condition, and pertains to the confederate sovereignty of the United States, and not to individual states. *Soutter, et al. v. D'Aury, et al.*, 364.
2. **CITIZENSHIP—CHILD BORN OF FOREIGN PARENTS.** The rule that a child born in a foreign country is a citizen of the country of her parents, is one confined to countries which derive their jurisprudence from the civil law, and is not the rule in this country. *Idem.*
3. **CITIZENSHIP—WHAT CONSTITUTES—CHILD BORN OF FOREIGN PARENTS.** The fourteenth amendment to the constitution of the United States provides that "all persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." Under this provision every person born within the dominion and allegiance of the United States, whatever the nationality of his parents, is a natural-born citizen of the United States. *Idem.*
4. **SAME—CHILDREN OF AMBASSADORS, ETC., EXCEPTIONS TO RULE.** This rule does not apply to children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence by a fiction of public law is regarded as a part of their country. Nor does the rule apply to persons born on a public vessel of a foreign country, while within the waters of the United States. The clause in the fourteenth amendment "subject to the jurisdiction of the United States" excludes all such persons from the operation of the general rule. Indians sustaining tribal relations are also excluded. *Idem.*
5. **WHETHER NATIONAL COMMON LAW.** The constitution of the United States presupposed the existence of the common law, and to a limited extent the principles of the common law prevail in the United States as a system of national jurisprudence. *Idem.*
6. **CLASS LEGISLATION.** In 1897 the legislature amended section one of the act of 1891 in relation to trusts and combines by adding a proviso, that in the mining, manufacture or production of articles of merchandise the cost of which is mainly made up of wages, it shall not be unlawful to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages:
Held (1) That section one as amended was in effect an amendment of the General Incorporation Law, and operated as an amendment of some but not all of the charters of corporations incorporated under that law and therefore was prohibited by section 2, article 2, of the constitution of 1870.
 (2) That section one as amended was unequal and partial legislation forbidden at common law and in violation of the constitution of the state, and of the fourteenth amendment to the Federal constitution, which prohibits a state from denying to any person the equal protection of the laws. One judge dissenting upon the proposition that the entire section was void on account of the unconstitutional proviso. *People v. Richards & Kelly Manufacturing Company*, 171.
7. **EFFECT OF UNCONSTITUTIONAL SECTION.** The fact that one or more sections of a law are unconstitutional does not affect the

entire law where the remaining sections make a complete law in themselves. *Idem.*

8. **EXEMPTION OF BUILDING AND LOAN ASSOCIATIONS.** The exemption of building and loan associations from the operation of a law requiring corporations to make an annual report that they are not a party to a trust or combine is not an arbitrary classification and does not invalidate the law. *Idem.*
9. **EVIDENCE—SELF-INCRIMINATION—IMMUNITY.** Where the officers of a corporation are compelled to file an affidavit that the corporation is not a member of any trust or combine, and it is provided that no corporation or individual shall be subject to any criminal prosecution by reason of anything truthfully disclosed by such affidavit, the immunity clause is sufficiently broad to protect the corporation and its officers, and such law is not obnoxious to the provisions of section 10, article 2, of the Illinois constitution, which provides that no person shall be compelled in any criminal case to give evidence against himself. *Idem.*
10. **"FLAG LAW."** The Illinois statute known as the "Flag Law" prohibiting the use of the national flag for advertising purposes is in derogation of the constitution and void as not being within the police power of the legislature and coming within the category of laws known as class legislation. *People ex rel. Sontag v. Kruse*, 536.
11. **SAME.** Relator, agent of the Anheuser-Busch Brewing Ass'n, was arrested for selling beer contained in bottles and barrels upon which appeared the trade mark of the Brewing Ass'n, consisting of a device in which stars and stripes appeared on a shield in connection with an eagle, alleged to be in violation of the Illinois flag law prohibiting the use of the national flag or emblem for advertising purposes. Upon *habeas corpus*, held that the law was unconstitutional and that relator should be discharged from arrest. *Idem.*

. CONSPIRACY.

CONTRACTS—RESTRAINT OF TRADE—FIXING RETAIL PRICE. Contracts between manufacturers of proprietary medicines and wholesale dealers fixing the price at which such medicine shall be sold by the wholesale dealers to retail dealers, and by which the wholesale dealers agree not to sell such medicines to such retail dealers as are placed upon a list by the manufacturers (such list comprising the names of those dealers who sell the proprietary medicines at less than the regular retail prices) are not in unlawful restraint of trade and competition. *Platt v. National Association of Retail Druggists*, 1.

CONTRACTS.

See Combinations and Monopolies.

1. **RESTRAINT OF TRADE—FIXING RETAIL PRICE.** Contracts between manufacturers of proprietary medicines and wholesale dealers fixing the price at which such medicines shall be sold by the wholesale dealers to retail dealers, and by which the wholesale dealers agree not to sell such medicines to such retail dealers as are placed upon a list by the manufacturers (such

- list comprising the names of those dealers who sell the proprietary medicines at less than the regular retail prices) are not in unlawful restraint of trade and competition. *Platt v. National Association of Retail Druggists*, 1.
2. **INJUNCTION—CONTRACTS IN RESTRAINT OF TRADE—COMPLAINANT'S REMEDY.** Where a person is not a party to a contract in restraint of trade, he has no standing to call upon a court of equity to interfere. The remedies imposed by the legislature for violations of the anti-trust laws ought to be pursued, and where the matter is not the construction or the enforcement of a contract between the parties who appear in the court, a court of equity ought not to take jurisdiction. *Idem*.
 3. **RESTRAINT OF TRADE.** Covenants in restraint of trade generally are void, because contrary to public policy, but where the restraint is only partial, and the restriction is reasonable, such contracts are legal and will be enforced. *Oppenheimer, et al. v. Sayer*, 74.
 4. **CONTRACTS EMBRACING ENTIRE STATE.** The doctrine of the common law that contracts which embrace the entire kingdom or state are void, has been modified by the later decisions. *Idem*.
 5. **CONSIDERATION—ADEQUACY OF.** At law a consideration of even one dollar is sufficient to support a contract. The court cannot inquire into its adequacy. *Idem*.
 6. **COURTS OF EQUITY.** A contract good at law is good in equity. A court of equity will inquire into the adequacy of the consideration only when the contract is sought to be specifically enforced, and the inquiry of the court then is, whether a court of equity will lend its aid to enforce the contract. *Idem*.
 7. **EMPLOYMENT CONTRACT—REASONABLENESS OF COVENANT.** An agreement by an employe not to engage in a particular business for three years after the termination of his employment is not unreasonable. *Idem*.
 8. **SAME—RULES APPLICABLE.** On an application for an injunction to restrain an employe from violating a contract not to engage in a particular business for three years after the termination of his employment, the decisions governing courts of equity as to decreeing specific performance of contracts control. *Idem*.
 9. **SPECIFIC PERFORMANCE—WHEN NOT GRANTED.** If there are any circumstances which render the enforcement of a contract unfair, harsh, oppressive or inequitable, specific performance will not be granted. *Idem*.
 10. **SAME.** Where an inexperienced employe was induced to sign a contract upon the representation that a fellow employe had signed a similar contract, which statement was false, and where the contract is unfair in that the complainants do not bind themselves to give employment to the defendant except from week to week, and do not bind themselves to teach him the business, or the secrets of such business, the court will not restrain a breach of such contract by injunction. In order to have such contracts enforced they must not be unilateral or one sided. They must be fair and not harsh or oppressive. *Idem*.
 11. **SAME—COVENANTS NOT TO ENGAGE IN BUSINESS.** The fact that all other business pursuits are open to an employe who has agreed not to engage in a particular business does not affect the reasonableness of the covenant. This is a good answer at law, but it is an unconscionable one in equity. *Idem*.

12. **MONOPOLIES—DESTRUCTION OF COMPETITION.** Neither the establishing of monopolies nor the destruction of competition are looked upon with favor by the courts. *The Public Grain and Stock Exchange v. The Western Union Telegraph Company, et al.*, 548.
13. **UNION LABOR CLAUSE.** A private individual has the undoubted right to insert in his agreements that none but union labor shall be employed in carrying out the contract. *Building Trades Council v. Board of Education of the City of Chicago*, 378.
14. **SAME—BOARD OF EDUCATION.** The board of education being public officials cannot insert such a stipulation in its contracts from mere sentiment or caprice, unless such action would subserve the public interests. *Idem.*
15. **SAME—PUBLIC POLICY.** If the board should decide that it is to the public interest to insert in its contracts that none but union labor should be employed, or if the board should provide that none but union workmen should be employed upon the pay-roll of the board, no one can complain. *Idem.*

Contracts for personal services.

16. **MANDATORY INJUNCTION TO COMPEL PERFORMANCE OF PERSONAL SERVICES.** A court of equity will not by its writ of injunction, compel the performance of purely personal services. Thus where a person leases a boarding house, in consideration of the making of a monthly payment of \$200 in cash, and \$25 a month in board and lodging to be furnished to the lessor, and the lessee refuses to furnish such board and threatens to eject the lessor from the premises, the court cannot interfere by injunction, as there is a complete and adequate remedy at law. *Hayden v. Kelly*, 22.

CONVEYANCES.

1. **CONVEYANCE ACT—APPLICATION TO EQUITABLE ESTATES.** Section 13 of the conveyance act which dispenses with the word "heirs" in the granting of estates, applies to both legal and equitable estates. *Korn v. Sears*, 372.
2. **TRUSTS—NATURE OF BENEFICIARIES' ESTATE.** A conveyance to trustees in trust for the "wife and child" of the testator is presumed to be a conveyance in fee simple in the beneficial use of the property for the maintenance and support of such beneficiaries. *Idem.*
3. **TRUSTS—FOR SUPPORT AND MAINTENANCE OF TESTATOR'S FAMILY—HOW LONG TO CONTINUE.** A conveyance to trustees for the maintenance and support of the "wife and child" of the testator will continue only so long as the child remains such. When such child arrives of age, the trust ceases. The same situation would exist where the child dies before becoming of age. *Idem.*
4. **TRUSTS—BENEFICIARIES—JOINT OR SEVERAL.** Where a trust estate is created for the benefit of a wife and child, it will be considered that it was created for their joint benefit. If therefore the trust ceases as to one beneficiary it ceases as to the other. *Idem.*
5. **NATURE OF BENEFICIARIES' ESTATE.** Upon the determination of such an estate the beneficiaries become tenants in common. *Idem.*

CORPORATIONS.

See also *Street Railroads, Combinations and Monopolies.*

I.

CORPORATE NAME.

II.

OFFICERS AND DIRECTORS.

III.

THE VALIDITY OF CORPORATE ACTS.

IV.

STOCK AND STOCKHOLDERS.

V.

LIABILITY OF STOCKHOLDERS TO CREDITORS.

VI.

ACTIONS.

VII.

REGULATION BY STATE.

VIII.

DISSOLUTION OF CORPORATION.

I. CORPORATE NAME.

1. POWER OF ILLINOIS CORPORATION TO PREVENT THE ORGANIZATION OF ANOTHER ILLINOIS CORPORATION OF A SIMILAR NAME. The legislature has by implication provided that an Illinois corporation may, by proper legal proceedings, prevent the organization of any other corporation under the laws of this state, with the same or a similar corporate name, when the consent thereto of such existing corporation has not been obtained. *Elgin National Watch Company v. Eppenstein, et al.*, 602.
2. TRADE NAMES—PROTECTION OF. When parties have, by their mode of doing business, and by the quality of their products, and, by selling and delivering to the public articles as valuable as represented, built up under a chosen name a reputation which is of great value, they should be protected in the use of that name; and the protection of the public in preventing any other persons from assuming a like or similar name is at the same time a protection of the parties. *Idem.*
3. TRADE NAMES—UNFAIR TRADE. The words "Elgin" and "National" and "Watch" are general or geographical words or names that can not be appropriated to the exclusion of others; but they may be so used when taken together or in connection with certain manufactured articles as to create and establish a special signification, and in the use of those words, or any or either of them, in such connection, and with such special signification, the parties entitled thereto should receive protection from the courts. *Idem.*

4. **PARTIES—UNORGANIZED CORPORATION.** Where the certificate of final organization of a corporation has not been filed in the recorder's office as required by statute, it is not necessary to make such corporation a party defendant in a bill to enjoin the recording of the certificate, as by so doing the complainant would admit that it was an existing corporation. *Idem.*
5. **RIGHT OF ONE ILLINOIS CORPORATION TO ENJOIN THE RECORDING OF A CERTIFICATE OF INCORPORATION OF ANOTHER ILLINOIS CORPORATION HAVING A SIMILAR NAME.** Certain parties procured from the secretary of state a final certificate of incorporation of "The Elgin National Watch Case Company, of Elgin, Illinois," but before this certificate was recorded in the office of the recorder of deeds of Kane County, Illinois, as required by statute, "The Elgin National Watch Company" and the "Elgin Watch Case Company" obtained a temporary injunction restraining the recording of the certificate of organization of "The Elgin National Watch Case Company, of Elgin, Illinois." Upon motion of defendants to dissolve the injunction, *held* that the names were so similar that confusion would result, and that the defendants should be enjoined from procuring to be recorded in the recorder's office the certificate of incorporation of "The Elgin National Watch Case Company of Elgin, Illinois." *Idem.*

II. OFFICERS AND DIRECTORS.

1. **BOARD OF DIRECTORS—VACANCIES—HOW FILLED.** The statute in relation to the election of directors provides that directors must be elected by the stockholders and states that "all other vacancies to be filled in accordance with by-laws." *Held* that inasmuch as it was the universal practice in Illinois for at least 35 years to permit vacancies in the board of directors to be filled by the other members of the board, that the court would not overthrow such a long settled practice, by holding that such vacancies must be filled by the stockholders. *Townsend et al. v. Chicago Union Traction Company, et al.*, 312.
2. **POWER OF BOARD OF DIRECTORS TO LEASE PROPERTY.** Where a street railway company leases its right of way under legislative authority, the board of directors have power to make changes in such lease. *Idem.*
3. **POWER TO INCREASE CAPITAL STOCK.** Where the charter provides that the capital stock may be increased and subsequently provides that all powers of the corporation are conferred on the board of directors, only the ordinary powers are referred to. The power to increase the capital stock is so fundamental a change as to require the unanimous consent of all the shareholders. *Idem.*
4. **LIABILITY OF DIRECTORS FOR MISTAKE AS TO VALUATION.** An honest mistake of directors as to property values gives neither the state nor any stockholder a ground of action. *Taylor v. Pullman Company*, 24.

III. THE VALIDITY OF CORPORATE ACTS.

1. **STREET RAILROADS—POWER TO LEASE.** Where street railroads are permitted by express statute to lease their right of way, the fact that the charter of a street railway company and the act under which the company is organized, are silent with respect to the power to lease, does not prevent the exercise of such

- power. *Townsend et al. v. Chicago Union Traction Company, et al.*, 312.
2. SAME—CONSENT OF STOCKHOLDERS. Unless the company was expressly empowered to lease its right of way, it could not by the mere act of its directors or even without unanimous consent of its stockholders, change its character from an operating to a leasing company. *Idem.*
 3. CHANGE OF CORPORATE PURPOSE—WHETHER FUNDAMENTAL. It is doubtful whether a change by a street railway company from an operating to a leasing company, is of so fundamental a character, as to require the unanimous consent of all the stockholders. *Idem.*
 4. LEASE OF STREET RAILWAY—CHANGE IN SAME—ESTOPPEL OF STOCKHOLDERS. Where a lease of a street railway which is not *ultra vires* in the sense that it is not void, has been acquiesced in by all of the shareholders, the shareholders are likewise estopped to question an amended lease which changes the terms of the original lease. The acquiescence of the shareholders in the original lease is not merely a consent to the terms of such lease, but also a consent that the fundamental character of the corporation should also be changed from an operating to a leasing company. *Idem.*
 5. PUBLIC SERVICE CORPORATIONS—LEASE OF PROPERTY OF. A public service corporation is without power to lease all of its property, thereby disabling itself from performing its public duties. The state or any stockholder may prevent the execution of any such lease. *Idem.*
 6. SAME—PUBLIC POLICY. But if the public policy or statutory law of the state permits such a corporation to execute such a lease, neither the state nor any stockholder can object. *Idem.*
 7. STREET RAILROADS—LEGISLATIVE POWER TO LEASE. Under the act of 1855 (Pr. L. 1855, p. 304) railroad companies have the power to lease their entire road. *Idem.*
 8. SAME—LEASE TO NON-OPERATING COMPANY. It is not essential that the lessee railroad should at the time of the lease be an operating company. *Idem.*
 9. SAME—WHETHER COMPANY NON-OPERATING. Assuming that a lease of a street railway is inoperative because made to a non-operating company, an amendatory lease made thereafter is not invalid, where the lessee company has acquired and operated certain extensions. *Idem.*
 10. CORPORATIONS—ACQUISITION OF STOCK IN OTHER CORPORATIONS. It is against public policy for one corporation to acquire a *majority* of the stock of another corporation for the purpose of controlling it. The holding of stock in other corporations for some purposes is not necessarily *ultra vires*. *Idem.*
 11. SAME—RIGHT OF LESSEE STREET RAILWAY COMPANY TO OWN SHARES OF STOCK OF LESSOR COMPANY. It is not against the public policy of Illinois for one street railway company to hold stock in another street railway company under certain circumstances, and where a lessee company is required to make a deposit in money or securities to secure the performance of the lease, the lessee corporation had the implied power to invest its funds in the shares of stock of the lessor company, as incident to the express power of acquiring a street railroad by lease, such purchase not being made for the purpose of securing control of the lessor company. *Idem.*

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12. **ULTRA VIRES ACTS—STOCKHOLDER OF ONE CORPORATION CANNOT COMPLAIN OF ULTRA VIRES ACTS OF ANOTHER CORPORATION.** A stockholder in one corporation has no footing in a court of equity to enforce purely public, or redress purely private rights as to or in connection with alleged *ultra vires* acts of another corporation. That is left to the people of the state under which the corporation had its charter, or to the stockholders or creditors having an interest. *Taylor v. The Pullman Company*, 24.
 13. **ULTRA VIRES ACTS—RIGHT OF STOCKHOLDER TO QUESTION.** A stockholder has a standing to question the *ultra vires* acts of his own corporation by which he may be injured because of the trust relation existing between him and the corporation. *Idem*.
 14. **POWER TO PURCHASE CARS, RIGHTS OF CORPORATION UNDER.** The power to purchase cars and lease the same to railroad companies confers power to purchase cars which are already leased to railroad companies. *Idem*.
 15. **ULTRA VIRES—PULLMAN COMPANY—POWER TO PURCHASE ASSETS OF WAGNER COMPANY ENGAGED IN SAME BUSINESS.** Under its charter the Pullman Company had power to purchase railway cars without limitation as to number or as to the party from whom the purchases might be made, and also all the powers, privileges, rights, etc., incident to such corporations and necessary or useful for the purposes of the corporation. *Held* that the Pullman Company immediately upon its organization could have made a purchase of the assets of the Wagner Company engaged in like business, "as incident to, necessary and useful" to it in the commencement of its business, and having such power it could make such purchase at any time thereafter that it was considered necessary or useful in carrying on the business of the corporation; and whether such purchase would be necessary or useful was for the board of directors to determine; and while such purchase might be an abuse of the charter power it was not an *ultra vires* act. *Idem*.
 16. **PURCHASE OF PROPERTY OF COMPETITOR BY PULLMAN COMPANY NOT VIOLATION OF ANTI-TRUST LAWS.** While the purchase of the Wagner Company by the Pullman Company may have removed the latter's chief competitor, yet the right to contract in that respect as to service by sleeping and dining cars with railroad companies is open to all. The purchase or combination of the Pullman Company with the stock and property of the Wagner Company did not necessarily give the Pullman Company the power to raise prices or prevent competition in the business of contracting with railway companies for the use of sleeping cars and furnishing accommodations connected therewith, and such purchase is not a violation of the anti-trust acts of Illinois, or of the United States act against restraint of trade and monopolies. *Idem*.
 17. **MONOPOLIES AND COMBINATIONS, WHEN ILLEGAL.** It is not every combination that is prohibited by the anti-trust laws, or that is opposed to public policy. It is not sufficient to create an illegal monopoly, that the transaction challenged may tend to restrain competition or tend to create a monopoly. The transaction complained of must necessarily put the purchaser in the position where he can, if he desires, create a monopoly. *Idem*.
 18. **RIGHT OF ENGLISH COMPANY TO OWN ENTIRE STOCK OF AMERICAN CORPORATION.** Whether it is lawful for an English company to own the entire stock of an American corporation,

quare. Fahrig v. Milwaukee & Chicago Breweries (Limited), et al., 296.

19. **SAME—LACHES.** But where a stockholder takes no action to protect his rights for over four years, and no sufficient reason appears why he did not do so, he is guilty of laches. *Idem.*

IV. STOCK AND STOCKHOLDERS.

(See also Sub. III, *supra.*)

1. **MAJORITY OF STOCKHOLDERS—WHAT CONSTITUTES.** The directors of a street railway company made a lease of the company's right of way, contingent upon the approval of a majority of the stockholders and provided for the calling of a special meeting of the stockholders "for the purpose of considering and voting upon the question of approving the action of the board of directors." Part of the stock, the property of the lessee, was held in trust under a deposit agreement, to secure the performance of the lease. *Held* that such deposited stock if incapable of being legally voted by the trustee, should not be taken into consideration in determining whether a majority of the outstanding stock had voted in favor of the lease. *Townsend et al. v. Chicago Union Traction Company et al.*, 312.
2. **STOCKHOLDER—RIGHT OF RECORD HOLDER TO VOTE.** The corporation and the other stockholders are not concerned with the beneficial ownership in determining the right of a stockholder of record to vote. *Idem.*
3. **RIGHT OF STOCKHOLDER TO ATTACK LEASE.** A stockholder of a lessor street railway company has no standing to attack an amendatory lease on the ground that it was made to a non-operating company, where such stockholder had assented to the original lease. *Idem.*
4. **ULTRA VIRES—ESTOPPEL OF STOCKHOLDER.** Where the property of the corporation is leased in violation of the charter any stockholder can enjoin the transaction even though the state could not object. Such right, however, is personal to the stockholder, and he may by his acquiescence estop himself and his successors in title from thereafter objecting. *Idem.*
5. **CHANGE IN CORPORATE PURPOSE—CONSENT OF STOCKHOLDERS.** Unless the law or charter otherwise provides, the unanimous consent of the stockholders is required to effect a fundamental change in the corporate purposes. *Idem.*
6. **RIGHT OF STOCKHOLDER TO EXAMINE BOOKS OF SUBSIDIARY CORPORATION.** Where an English corporation owns the entire stock of an American corporation, and does no other business of any kind except to own such stock, a stockholder in the English corporation is entitled to examine the books of the American corporation, and is not obliged to resort to the English courts for relief. *Fahrig v. Milwaukee & Chicago Breweries (Limited), et al.*, 296.

V. LIABILITY OF STOCKHOLDERS TO CREDITORS.

1. **CAPITAL STOCK—TRUST FUND FOR CREDITORS.** The capital stock of a corporation is a trust fund for its creditors. This trust fund consists of the capital paid in and that which the creditor has promised to pay in. *The Buda Foundry & Manufacturing Company, et al. v. Columbian Celebration Company, et al.*, 398.

2. **SAME—DEVICE TO AVOID STOCK LIABILITY.** Any device between stockholders, or between stockholders and the corporation, by which the stockholders' liability to the creditors is sought to be avoided, is against public policy and void, even though the transaction may be binding as between themselves. *Idem.*
3. **SUBSCRIPTION TAKEN IN PROPERTY—OVERVALUATION—HONEST MISTAKE, ETC.** A subscription to stock may be paid in property but there must be an honest attempt to arrive at the actual value of the property. If the property is fraudulently overvalued, such overvaluation will be held void as a matter of law, although an honest mistake as to such value will not invalidate the transaction. *Idem.*
4. **SAME—EFFECT OF OVERVALUATION—HOW STOCK MUST BE PAID FOR.** If the property contributed in payment of a subscription is not valued in good faith, or if there is an intentional overvaluation by the directors, or if the property is entirely worthless, the stock will be considered as not fully paid. As against creditors the stock must be paid for in "money or money's worth." *Idem.*
5. **SAME—PAYMENT OF SUBSCRIPTION IN PROPERTY—GOOD FAITH OF DIRECTORS.** To constitute a valid payment of a stock subscription by the transfer of property, there must be good faith on the part of the directors. The law does not require infallible judgment, but where the evidence shows an intentional overvaluation or any device to obtain possession of the stock without fully paying for it, the transaction will be deemed fraudulent in law and in fact. *Idem.*
6. **SAME—CRUDE AND UNDEVELOPED INVENTIONS AS PAYMENT FOR STOCK SUBSCRIPTIONS.** Where the evidence shows that an inventor and organizer of a corporation turned over to the corporation in full payment for his subscription of \$2,000,000, certain crude and undeveloped inventions which had never been in use and had no known value, and the board of directors was controlled by such inventor, and it was not shown that any of said board honestly believed that the inventions were worth the amount of said subscription and there was no honest discussion or inquiry as to the value of such inventions, it was held that the scheme was a fraudulent one and the stock could not be considered as paid up. *Idem.*
7. **SAME—ENTIRE STOCK OF CORPORATION ISSUED IN EXCHANGE FOR CERTAIN INVENTIONS—WHETHER PAID FOR.** Where the entire capital stock of a corporation is issued in exchange for certain inventions to be used in a certain amusement enterprise, and the company possessed no land, or site for the projected building, and it had no means of obtaining any money, except from its subscriptions, these facts must be taken into consideration in determining the good faith of the transaction. *Idem.*
8. **SAME—VALUE OF PROPERTY—FUTURE PROFITS—SPECULATIVE VALUES.** Property taken in payment of stock subscription must be capable of pecuniary estimate. A guess or an estimate as to the value of a right to use certain crude and undeveloped inventions, based entirely on speculative profits from the future use of such inventions cannot be considered as determining the value of such inventions. *Idem.*
9. **SAME—ARRANGEMENT BETWEEN STOCKHOLDERS AS TO PAYMENT OF SUBSCRIPTIONS.** Any arrangement between stockholders by which the stock is but nominally paid up, the corporation not

- in fact getting the benefit of the price in good faith, will be regarded as a sham and not as a valid payment, as against the creditors of the corporation. *Idem.*
10. SAME—FRAUDULENT PAYMENT OF SUBSCRIPTION. Where certain inventions are turned over to a corporation in payment of a subscription to its stock and a large part of such stock is turned back into the treasury of the corporation to be used for promotional purposes, such transaction will be considered as fraudulent both in law and in fact. *Idem.*
 11. PAROL EVIDENCE—ADMISSIBLE TO SHOW WHAT AGREEMENT REFERRED TO. Where a subscriber for the bonds of a certain corporation is entitled to certain shares of stock as a bonus and no particular shares of stock are designated, parol evidence is admissible to show what particular stock is referred to. *Idem.*
 12. STOCK SUBSCRIPTION—EFFECT OF ISSUANCE OF STOCK AS FULLY PAID—RECITAL IN CERTIFICATE. The mere fact the stock was issued as fully paid does not make it so in fact. The subscribers cannot safely rely upon the recital on the face of the certificate that the stock is fully paid and make no further inquiry. *Idem.*
 13. CERTIFICATE OF STOCK—RECEIPT OF—IMPLIED PROMISE TO PAY THEREFOR. A promise to take a share of stock imports a promise to pay for it, even though the certificate is stamped "non-assessable." *Idem.*
 14. SUBSCRIPTION FOR BONDS AND STOCKS—APPLICATION OF PAYMENTS—STOCK LIABILITY. Where defendants subscribe for bonds of a corporation and receive certain shares of the capital stock of the corporation as a bonus, and an action is instituted to enforce a liability on such stock to the creditors of the corporation, a court of equity will not treat the money paid under the subscription agreement as paid upon the stock, as against the claim of creditors becoming such with knowledge that the stock was unpaid. *Idem.*
 15. STOCK SUBSCRIPTION—BONA FIDE PURCHASERS—BONUS STOCK. Where certain persons subscribed for the bonds of a corporation and received certain shares of its stock as a bonus, to be delivered upon payment for the bonds, such subscribers were put upon inquiry as to the character of the stock and the right of the corporation to dispose of it at less than par. If no inquiry was made, the law holds such stockholders chargeable with that knowledge which a reasonable inquiry would have disclosed. *Idem.*
 16. SAME—WHETHER STOCK TRANSFERRED BY CORPORATION IS A BONUS OR GIFT, OR A SALE. The defendants subscribed for certain corporate bonds and received with such subscription certain stock of the corporation as a gift or bonus. The stock in question had been previously subscribed for and supposedly paid for by the transfer to the corporation of certain inventions of doubtful value, and thereafter such stock was turned back into the treasury of the corporation for the purpose of re-issuing the same to the subscribers for the bonds. *Held* that inasmuch as the stock was turned back to the corporation without anything being paid for it, it stood in the same position as if it was never issued and upon its re-issuance to the subscribers for the bonds, such subscribers cannot be treated as assignees but must be treated as original subscribers and held liable as such. *Idem.*

17. **SUBSCRIPTION AGREEMENT—REQUISITES OF.** No particular form of words is necessary to constitute an agreement to become a stockholder. If the contract amounts to an agreement to take stock from the company that is sufficient. *Idem.*
18. **STOCKHOLDERS—CHARGEABLE WITH NOTICE THAT STOCK MUST BE PAID FOR.** Subscribers to the capital stock of a corporation are presumed to know that the corporation could not legally issue fully paid stock to any one agreeing to become a stockholder, without the same being paid for in money or in money's worth. *Idem.*
19. **LIABILITY OF STOCKHOLDERS—STOCK RECEIVED AS BONUS WITH PURCHASE OF BONDS—EFFECT OF REFUSAL TO ACCEPT.** Certain persons agreed to take and pay for certain bonds of a corporation. The subscription agreement provided that upon full payment being made the subscriber should be entitled to receive certain shares of stock as a bonus. After signing the subscription agreement and paying for the bonds, certain of the subscribers neglected or refused to accept the stock. *Held* that the true construction of the agreement was that upon the payment for the bonds the subscriber *eo instanti* became entitled to the stock, and thereupon the liability of such subscribers became fixed as stockholders and they could not rescind such agreement in whole or in part, as against the creditors of the corporation. *Idem.*
20. **SAME—EFFECT OF REFUSAL TO ACCEPT STOCK OR BONDS.** The same measure of liability attaches to such of the subscribers of bonds who either refused or neglected to take either stock or bonds. Having paid for the bonds and not having exercised any right to rescind the subscription agreement their liability to creditors became fixed and determined. *Idem.*
21. **SUBSCRIPTION AGREEMENT—RIGHT TO RESCIND.** Upon the execution of a subscription agreement, the liability of a subscriber to the creditors immediately attaches, and such subscriber cannot escape liability by a rescission of the contract. *Idem.*
22. **STOCKHOLDERS' LIABILITY—PURCHASERS FOR VALUE—LIABILITY OF—EFFECT OF NOTICE.** A purchaser or assignee of stock which has not been fully paid is not liable to corporate creditors, where the stock has been issued as fully paid and he has acquired the same in good faith and without notice that it has not been fully paid. But if he has notice that it is not fully paid he is liable. *Idem.*
23. **STOCKHOLDER'S LIABILITY—EXTENT OF KNOWLEDGE THAT STOCK IS NOT PAID UP.** Where the subscribers to bonds of a corporation receive an equal amount of the shares of stock of the corporation as a bonus and at the time of the making of the subscription they are informed that the capital stock has been paid up by the transfer to the corporation of certain inventions and patents, and such inventions and patents are of uncertain and doubtful value and such subscribers, blinded by the promise of large dividends, rely upon the statements of the officers of the corporation as to the value of the inventions, etc., and make no independent inquiry, they are chargeable with knowledge that such stock is not paid up, and cannot be considered as purchasers for value. *Idem.*
24. **SAME—BELIEF OF SUBSCRIBER THAT STOCK IS PAID UP—EFFECT OF.** The fact that the subscribers honestly believed that the capital stock was fully paid for is no defense to an action to

enforce a stock liability. In order that such belief should be available as a defense it must be based upon a statement of facts which the purchasers believed to be true and which facts if true would constitute a sufficient payment of such stock. A mere statement either of fact or law by a third person is not in itself a sufficient foundation for a belief, which the law will recognize as relieving such person from liability, but the facts from which such conclusion is arrived at must be considered. *Idem.*

25. **SAME—GOOD FAITH OF SUBSCRIBER—EFFECT OF BELIEF IN SUCCESS OF ENTERPRISE.** It is not a defense to an action to enforce a stock liability that the subscriber acted in good faith in signing the subscription agreement, or that he believed that the enterprise would be a success. *Idem.*
26. **STOCK SUBSCRIPTION—PAYMENT IN MONEY'S WORTH—RULE IN ILLINOIS.** The courts of Illinois have not departed from the rule that the payment of a stock subscription is not good as against creditors where payment has not been made in money or money's worth. Stock may be paid for in property but such property must be valued in entire good faith. If there is an overvaluation combined with a failure to exercise any judgment as to the value of the property, or where there is an intentional overvaluation or where the circumstances show that the transaction was a mere fraudulent device, the stock will not be considered as full paid. *Idem.*
27. **SAME—LIABILITY OF ASSIGNEE—EFFECT OF NOTICE.** The purchaser of stock issued as "paid up" with notice that it is not paid up, or with notice of facts connected therewith, is liable to the creditor to the same extent as his immediate transferor. *Idem.*
28. **SAME—WHEN STOCKHOLDERS ARE BONA FIDE PURCHASERS—WHAT KNOWLEDGE IMPUTED TO THEM.** Persons purchasing the bonds of a corporation and receiving its stock as a bonus are not permitted to deal with the corporation with their eyes shut. As bond holders they are chargeable with notice of the contents of the mortgage and with the provisions of any contracts referred to therein, and as stockholders they must take notice of the amount of the capital stock, the contents of the charter, as well as the law of the land governing such corporations. Where the circumstances are sufficient to put a reasonably prudent and cautious man upon inquiry as to the good faith of the transaction by which the stock of the corporation is paid up, such subscribers cannot be considered as innocent holders. *Idem.*
29. **SUBSCRIPTION TO STOCK—EVIDENCE OF.** Evidence examined and held sufficient to show that certain defendants were liable as subscribers to the capital stock, even though it was not shown that they actually signed the subscription agreement. *Idem.*
30. **LIABILITY OF STOCKHOLDERS—ENFORCEMENT AGAINST ESTATE—PERSONAL REPRESENTATIVES NOT MADE PARTIES.** Where an action is instituted to enforce a stockholder's liability, and such stockholder dies during the pendency of the suit, no decree can be rendered against his estate, where his personal representatives have not been made parties. *Idem.*
31. **LIABILITY OF STOCKHOLDERS—BURDEN OF PROOF.** Where complainants in an action to enforce stockholder's liability, show that certain stock which had been transferred to one of the defend-

- ants was unpaid stock the burden of proof was upon such defendant to show that he is a purchaser for value. *Idem.*
32. CREDITOR'S AND STOCKHOLDER'S BILLS—JUDGMENT AND CONTRACT CREDITOR'S—RIGHTS OF. A judgment creditor has a standing in equity to pursue all the property of his debtor and can equitably attach all rights and credits of his debtor. A simple contract creditor has no such standing in a court of equity and can only file a bill to enforce stockholder's liability by virtue of section 25 of the general incorporation act. *Idem.*
33. STATUTE OF LIMITATIONS—IN ACTION TO ENFORCE STOCKHOLDER'S LIABILITY—WHEN A BAR. A bill was filed to enforce stockholders' liability and a demurrer was sustained thereto and the bill dismissed. Upon appeal the judgment was reversed. The defendant was not notified of the redocketing of the case within five years as required by law. *Held* that the statute of limitations was a bar to the action. *Idem.*
34. SAME—ESTATES OF DECEASED STOCKHOLDERS. Where an action is brought to enforce a stockholder's liability and certain stockholders de cease during the pendency of the suit, and the suit is not revived by bringing in the executors or administrators of such deceased stockholders within two years from the date of the issuance of the letters, the only decree that can be made against any executor or administrator is that the same be paid out of assets discovered or inventoried after the expiration of said two years. *Idem.*
35. STOCK AND STOCKHOLDERS—LIABILITY OF TRUSTEE. Where certain shares of stock are deposited with a bank as trustee to deliver the same to the subscribers for bonds of the corporation as a bonus, and such bank merely acts as a conduit through which the corporation transfers said stock to the bondholders such bank is not liable as a stockholder within the meaning of section 25 of the General Incorporation Act of Illinois. *Idem.*
36. ENFORCEMENT OF STOCKHOLDER'S LIABILITY—RIGHT TO SET OFF CLAIMS AS BONDHOLDERS. Where certain defendants subscribe for the bonds of a corporation and receive stock of the corporation as a bonus, and an action is instituted to enforce a stockholder's liability with respect to such bonus stock, it was *held* that the defendants were not entitled to set off the amount of their liability on the stock against any claim they may have on the bonds. They must first pay for their stock and then file their claim on the bonds. *Idem.*
37. BONDHOLDERS—RIGHT TO SHARE EQUALLY WITH OTHER CREDITORS—APPLICATION OF MAXIM "HE THAT DOETH INIQUITY SHALL NOT HAVE EQUITY." Bondholders of an insolvent corporation who were also stockholders, but received their stock as a bonus with their subscription for bonds, are entitled to share equally with other creditors in the distribution of the corporate assets, even though they originally paid nothing for their stock. Although the transaction by which they received their stock as a bonus was fraudulent in law, there being no actual fraud, such stockholders cannot be considered as not coming into court "with clean hands." *Idem.*

VI. ACTIONS.

A. Between corporation and its stockholders.

1. MOTIVE. Motive of complainant in filing a bill for an injunction to enjoin a corporation from purchasing the property of an-

- other corporation should be considered upon a motion for a temporary injunction. *Taylor v. The Pullman Company*, 24.
2. **Complainant, the owner of but little more than the one-hundredth part of one per cent. of the capital stock of the Pullman Company, an Illinois corporation, filed his bill on Dec. 28, 1899, for an injunction against the defendant, to enjoin it from carrying out an intended purchase of all the property of the Wagner Palace Car Company, a joint stock corporation organized under the laws of New York, and from delivering 200,000 shares (\$100 each) of the capital stock of the Pullman Company as the purchase price proposed to be paid for said property. December 30, 1899, was fixed as the day for the completion of the sale. Complainant purchased his stock (100 shares) about one month before, and after the call for, the meeting of stockholders of the Pullman Company, on December 5, 1899, called to ratify the purchase. The motion for the injunction was heard on December 30, 1899, and denied. Thereafter the purchase was consummated, the Wagner Company dissolved, and stock of the Pullman Company issued in payment for the assets of the former. In May, 1901, a motion was made by complainant for leave to file a supplemental bill and for a temporary injunction based upon the original bill, affidavits and answer. *Held*, that complainant was not entitled to an injunction or to any equitable relief. *Idem*.**
 3. **PARTIES—LACK OF NECESSARY PARTIES.** The holders of stock of a defendant company issued, during the pendency of the suit, for the purchase of certain property, are necessary to parties to a supplemental bill proposed to be filed for the purpose of restraining a purchase of such property, and in the absence of such parties a motion for a temporary injunction will be denied. *Idem*.
 4. **LIS PENDENS TO PURCHASERS OF CORPORATE STOCK.** Where the complainant has not prosecuted his suit in good faith with all reasonable diligence and without unnecessary delay, purchasers of stock issued while the suit for a temporary injunction was pending cannot be held to have taken their stock with constructive notice of the pendency of the suit and subject to future proceedings therein. *Idem*.
 5. **CREDITORS' BILLS—WINDING UP PROCEEDINGS—JURISDICTION OVER STOCKHOLDERS.** A creditors' bill filed in a Federal court against a corporation to collect unpaid judgments is not in the nature of a winding up proceeding and does not subject either the corporation or its stockholders to the exclusive jurisdiction of such court, in their relations with each other. *Townsend, et al. v. Chicago Union Traction Company, et al.*, 312.
 6. **RECEIVERS—WHETHER NECESSARY PARTIES TO STOCKHOLDERS' SUIT.** The receivers of a corporation are not necessary parties to a minority stockholders' suit, where the controversy relates to the voting power of certain stock held by a trustee, the legality of an election of, and the extent of the power of directors, etc. *Idem*.
- B. Between corporation and state.**
7. **CHARTER A CONTRACT—PROPERTY RIGHT OF STATE THEREIN.** If, as conceded, a charter is a contract between the state and a corporation, the former has such a property interest therein as will give a court of equity jurisdiction of the cause, to ascertain whether the facts charged in the information are true, and having acquired jurisdiction for any purpose, it may enjoin

such acts on the part of defendant as amount to infractions of the laws, although such acts may be criminal in their nature. *People ex rel. v. Chicago Fair Grounds Association*, 108.

VII. REGULATION BY STATE.

The legislature has the right to classify all corporations, but such classification must not arbitrarily discriminate between corporations in substantially the same situation. *People v. Richards & Kelly Manufacturing Company*, 171.

VIII. DISSOLUTION OF CORPORATIONS.

POWER OF CORPORATIONS AND JOINT STOCK ASSOCIATIONS ENGAGED IN A BUSINESS AFFECTED WITH A PUBLIC INTEREST, TO DISSOLVE. A corporation chartered to carry on a business affected with a public interest is under an obligation or duty to carry on such business during the life of its charter, and not to discontinue its business and dissolve, except with the consent of the state, but a joint stock association (such as the Wagner Joint Stock Association) organized under a law expressly providing that such associations may be dissolved in pursuance of its articles of association, whose articles provide for a dissolution upon sixty days' notice given, can dissolve itself because there is a limit to the implied obligation to continue in business, granted by the state, to the effect that it should serve the state until it choose to dissolve itself in pursuance of its articles of association; nor under such a provision is there any implied obligation not to dissolve for the purpose of selling its property, or for the purpose of enabling its shareholders to sell their interest in such property, for cash or for the stock of some other corporation. *Taylor v. The Pullman Company*, 24.

COUNTY COURTS.

1. **PROHIBITION AGAINST COUNTY COURT.** The county court is not such an "inferior court" as a court to which the circuit court could issue its writ of prohibition. *People ex rel. Lindauer v. Prendergast*, 308.
2. **PROHIBITION—MATTER OF DOUBT.** Where the court has any doubt whatever as to its own jurisdiction over the county court that is sufficient cause of itself for the denial of the writ of prohibition. *Idem*.
3. **PROHIBITION—APPEALS FROM COUNTY COURT.** The fact that the appellate court has appellate jurisdiction over the county court, while the appellate jurisdiction of the circuit court over the county court is doubtful, is a sufficient reason for refusing the writ of prohibition. *Idem*.

COURTS.

See *Prohibition*.

1. **CORRECTION OF RECORD.** The court in the exercise of its equitable power may properly correct its records and amend its orders and judgments, even after the term at which the order was entered has gone by. Such amendments, however, must be made from the minutes of the judge. *Pinkerton, et al. v. Grand Pacific Hotel Company*, 517.

2. **SAME—BY WHOM MADE.** The power to amend the record of the court rests only in the particular court where the error occurred. *Idem.*
3. **COUNTY COURT NOT INFERIOR COURT.** The county court as to the subject matters committed to its charge by the constitution and general assembly is not an "inferior court" in the technical sense in which that term is used. *People ex rel. Lindauer v. Prendergast*, 308.
4. **POWER AND DUTY OF JUDGE.** It was never intended that a judge in a court of law should be the governing power. His duty is to construe the law, and administer it. *People ex rel. v. Mohr, et al.*, 100.
5. **JURISDICTION OF COURTS—CONFLICT BETWEEN STATE AND FEDERAL.** The pendency in a Federal court, of a creditors' bill filed by certain judgment creditors under which receivers were appointed, with authority to operate the property under the orders of the court, is not a bar to a subsequent proceeding instituted in the state court by minority stockholders, to restrain the corporation, its officers and directors, from entering into and carrying out certain contracts alleged to be *ultra vires*. *Townsend, et al. v. Chicago Union Traction Company, et al.* 312.
6. **SAME—RES ADJUDICATA.** Where the Federal court has decided that there is no conflict, this is not conclusive on the state court. *Idem.*
7. **SAME—CREDITORS' BILLS—NATURE OF.** A creditors' bill filed in a Federal court against a corporation to collect unpaid judgments, is not in the nature of a winding up proceeding and does not subject either the corporation or its stockholders to the exclusive jurisdiction of such court, in their relations with each other. *Idem.*
8. **INJUNCTION—ANNULLING PAST ACTS.** Where a bill is filed to restrain the doing of a certain act, the doing of which should and would have been enjoined, but for the intervening injunction of a Federal court, it is the duty of the court to issue the injunction to annul such acts, upon the dissolution of the restraining order in the Federal court. *Idem.*
9. **PRACTICE—RENEWAL OF MOTION FOR INJUNCTION.** Where a motion for an injunction, or to dissolve one, is passed upon by one branch of the court, it is an improper practice to renew such motion based upon the same identical pleadings and evidence, before another branch of the court. *Taylor v. The Pullman Company*, 24.
10. **COURTS OF EQUITY—SUPERVISORY POWER OF.** A court of equity cannot undertake to supervise the entire wholesale drug trade in a city and see that the wholesalers sell goods to complainant or any one else. *Platt v. National Association of Retail Drug-gists, et al.*, 1.

CREDITOR'S BILLS.

1. **CREDITOR'S AND STOCKHOLDER'S BILLS—JUDGMENT AND CONTRACT CREDITORS—RIGHTS OF.** A judgment creditor has a standing in equity to pursue all the property of his debtor and can equitably attach all rights and credits of his debtor. A simple contract creditor has no such standing in a court of equity and can only file a bill to enforce stockholder's liability by virtue

of section 25 of the general incorporation act. *The Buda Foundry & Manufacturing Company, et al. v. Columbian Celebration Company, et al.*, 398.

2. CREDITORS' BILLS—NATURE OF. A creditors' bill filed in a Federal court against a corporation to collect unpaid judgments, is not in the nature of a winding up proceeding and does not subject either the corporation or its stockholders to the exclusive jurisdiction of such court, in their relations with each other. *Townsend, et al. v. Chicago Union Traction Company, et al.*, 312.

CRIMINAL LAW.

See *Burglary, Forgery, Homicide, Indictment, Venue.*

I.

IN GENERAL.

II.

INDICTMENT.

III.

CHANGE OF VENUE.

IV.

SENTENCE AND COMMITMENT.

V.

BAIL.

I. IN GENERAL.

1. CRIMINAL CASE. The term "criminal case" is broad enough to include any prosecutions for penalties or forfeitures. *People v. Richards & Kelly Manufacturing Company*, 171.
2. CRIMINAL CODE DOES NOT REPEAL COMMON LAW. The criminal code was not intended as a complete codification of the criminal laws; the common law remains in force except in so far as it is expressly repealed. *People v. Davis, et al.*, 217.
3. FORGERY—ALTERATION OF PROCEEDINGS OF CITY COUNCIL. The defendants were indicted under the statute of Illinois for forgery for altering the printed records of the city council of Chicago in reference to its action on a certain report of the commissioner of public works relating to the construction of certain tunnels and conduits of the Illinois Telephone and Telegraph Company. The report was in fact ordered by said city council to be "placed on file" but the printed record of the city council was changed so as to read "which was on motion of Ald. Novak (8th ward) *duly approved* and placed on file." *Held* that this constituted a forgery of a record or other authentic matter of a public nature by which a pecuniary demand or obligation or a right in property is or purports to be created, conveyed, transferred, diminished or destroyed with intent to damage and defraud some person, body politic or corporate, constituting the statutory crime of forgery. *People v. Wheeler, et al.*, 387; *contra People v. Loeffler, et al.*, 381.

4. **PUBLIC RECORDS, WHEN SUBJECTS OF FORGERY.** A public record or other authenticated matter of a public nature, to be the subject of forgery must be one that affects a pecuniary demand or obligation, or property right; and this must be manifest on the face of the document itself, or by averment in the indictment of extrinsic facts which show that it is of such a character. *People v. Loeffler, et al.*, 381.
5. **INJUNCTION TO RESTRAIN CRIME.** A court of equity has no jurisdiction to restrain the commission of a crime, nor to enforce moral obligations, nor can it rightfully interfere with the performance of an illegal act, merely because it is illegal, in the absence of any injury to property rights. *People ex rel. v. Chicago Fair Grounds Association*, 108.
6. **MANSLAUGHTER—COMMISSION OF UNLAWFUL ACT.** A person cannot be held liable for the crime of manslaughter merely because at the time of the killing he was engaged in an unlawful act, unless the unlawful act or omission was in its nature wrongful independently of statutory enactment, or unless the natural consequences of the unlawful act or omission are dangerous to life or limb, or the act is *malum in se*. *People v. Davis*, 245.
7. **MANSLAUGHTER—DUE CAUTION AND CIRCUMSPECTION—QUESTION FOR JURY.** It is a question for the jury to determine whether the defendants used due caution and circumspection in failing to equip a theater with fire apparatus and equipment as required by law, whereby death is caused. *Idem*.
8. **DUTY—NECESSITY OF.** Where there is no duty imposed either by law or contract upon a particular person to do a particular act, no penalty can be imposed upon him for its non-performance. The duty must be a plain one and the person who must perform it must be specifically designated. *Idem*.
9. **ORDINANCES—DUTY TO COMPLY WITH.** Although an ordinance providing for the installation of certain fire apparatus in buildings of a certain class fails to designate the person who shall perform the duty, it is a violation of the ordinance to use and occupy a building constructed in violation of the law, without complying with the ordinance. *Idem*.

II. INDICTMENT.

1. **MOTION TO QUASH INDICTMENT AT COMMON LAW.** At common law a motion to quash an indictment was addressed to the sound discretion of the court. *People v. Davis, et al.*, 217.
2. **RULE IN ILLINOIS.** But in Illinois error may be assigned upon the overruling of a motion to quash, and it is the duty of the court to quash if the indictment is insufficient to sustain a conviction. *Idem*.
3. **ALLEGATIONS OF INDICTMENT.** An argumentative averment of fact is not sufficient in an indictment. *Idem*.
4. **ALLEGATION AS TO DUTY.** An allegation in an indictment that it was the duty of a defendant to perform certain acts is a mere conclusion of the pleader. *Idem*.
5. **INDICTMENT—CONCLUSIONS.** An allegation that if certain fire equipment had been provided as required by an ordinance, a fire could have been extinguished, is a mere conclusion of the pleader. *Idem*.
6. **INDICTMENT—CONCLUSIONS IN.** In an indictment the *facts* con-

- stituting the offense must be set out. The indictment cannot be aided by the averment of conclusions of law or fact. *Idem.*
7. **MISJOINDER.** Whether several defendants who are charged with failure to perform several duties can be joined in the one indictment, doubted. *Idem.*
 8. **MISJOINDER.** The manager of a theater and building, the business manager of such theater and the stage carpenter thereof, cannot be joined in an indictment for manslaughter for an alleged failure to equip such theater and building and the stage thereof with certain fire apparatus and equipment. *Idem.*

III. CHANGE OF VENUE.

1. **CHANGE OF VENUE—LOCAL PREJUDICE.** A change of venue will seldom be granted from a large city where many men are eligible for jury service; but where the defense presents over 12,000 affidavits as to the existence of prejudice, and the state about 4,000 counter affidavits, the change of venue must be granted. *People v. Davis*, 207.
2. **SAME—APPLICATION FOR—MERE NUMBER OF AFFIDAVITS.** Mere numbers alone of affidavits that the defendant cannot receive a fair trial in the county do not govern the granting of the change of venue, but the character and reputation of the persons making the affidavits will be considered. *Idem.*
3. **SAME—CHARACTER AND NUMBER OF AFFIDAVITS.** Where vast numbers of affidavits of prejudice are presented, among which are those of large numbers of prominent men, the court will grant the change of venue, and such a record is conclusive upon the court that prejudice still exists although the catastrophe for which the defendant was indicted occurred a year or more previous. *Idem.*
4. **CHANGE OF VENUE FROM COUNTY IN CRIMINAL CASES—TIME OF APPLICATION.** Where a petition for a change of venue from the county alleges that there is such a prejudice on the part of the people against the petitioner that he cannot have a fair and impartial trial, and that he did not become aware of such prejudice until September 27, 1904, at some time after 4 p. m., and notice of the application for a change of venue was served at 9:30 a. m. on the following day, it was held that the application was made in apt time. *People v. Davis, et al.*, 191.
5. **CHANGE OF VENUE—CRIMINAL CASES.** Where a defendant in a criminal case cannot have a fair trial in the country where he resides or where the offense is committed he is entitled to a change of venue. *Idem.*
6. **SAME.** Nor is such right affected by the fact that such change of venue would greatly increase the expense of trial to the state. *Idem.*
7. **SAME—DUTY OF STATE.** If the state's attorney on an application for a change of venue believes that no prejudice in fact exists it is his duty to contest the application. If, on the other hand, he believes that a prejudice does exist he should consent to the making of the change and not charge the court with the responsibility of doing so. *Idem.*

IV. SENTENCE AND COMMITMENT

1. **INDICTMENT FOR ASSAULT WITH INTENT TO MURDER—PLEA OF GUILTY—SENTENCE FOR "BURGLARY, ETCETERA"—HABEAS CORPUS.** The petitioner was indicted for an assault with intent to mur-

der, and upon a plea of guilty was sentenced for the crime of "burglary, etcetera," to the Pontiac reformatory. Upon a petition for *habeas corpus*, *held* that this was a case where a party is indicted, pleads guilty to one crime and is sentenced by the court for another and a different and greater crime, and that the court had no jurisdiction to enter such judgment, and that the prisoner must be discharged. *People ex rel. v. Mallory*, 455.

2. SENTENCE FOR CRIME NOT UPON THE RECORD. Where a man is sentenced for a crime that does not appear upon the record, the jurisdiction of the court is lacking. *Idem*.
3. SENTENCE FOR CRIME TO REFORMATORY WHERE RECORD DOES NOT SHOW AGE OF PRISONER. The presumption of law is that the record being silent the prisoner was twenty-one years of age when he was sentenced to the reformatory. The relator was sentenced to the reformatory when there was nothing on the face of the record to show that his age was even inquired into, the law presuming him to be a man of twenty-one years of age when in fact he was eighteen. *Held*, that it is jurisdictional as to the right of the court to send the relator to the reformatory, and that this was a fatal objection to the right of the warden of the reformatory to hold the relator under such a mittimus. *Idem*.
4. AMENDMENT OF MITTIMUS TO SHOW AGE OF PRISONER. Relator was sentenced to the reformatory, the record not showing his age. Two years after he had been in the reformatory the relator was brought into court and the mittimus amended *nunc pro tunc* to show his age. *Held*, that it is going too far to hold that after a party had been in the penitentiary for two years he can be brought up and the judgment amended in his case by oral evidence, or that it can be corrected on account of an alleged misprision of the clerk after service of this kind, and *held* that when that amendment was made the court was without jurisdiction, more than two years having elapsed, the party having served a portion of his sentence, and the court having no power to go back and make that legal which was illegal during the two years he was serving. *Idem*.

V. BAIL.

1. APPLICATION FOR—AFTER VERDICT OF GUILTY. Under the Illinois statute all persons are entitled to bail at any time before *conviction*, except where the offense is a capital one. *Held* that where the defendant was indicted for receiving stolen property the verdict of a jury finding the defendant guilty was a conviction, even though a motion for a new trial was pending, and that such defendant was not entitled to be released on bail. *People v. Davis*, 528.
2. NATURE OF. Bail is both a constitutional and statutory right, and the court has no discretion in the matter except to fix the amount. *Idem*.

DEBTOR AND CREDITOR.

CREATING RELATION BETWEEN TRUSTEE AND MORTGAGOR BY RECITALS IN RECEIPT FOR MONEY. A trustee by accepting payments on account of an indebtedness secured by a trust deed cannot cre-

ate the relation of debtor and creditor between himself and the mortgagor by recitals in receipts given on account of such indebtedness. *Chetlain, et al. v. De Grazie, et al.*, 567.

DECREE.

1. **DIVORCE—SETTING ASIDE DECREE OF—PROCURING ABSENCE OF DEFENDANT.** Where a party obtains a decree or judgment in the absence of the opposite party, who has been led to believe that his case was not to be heard at the particular time, the court will set such judgment or decree aside where the case was heard in such party's absence. *Jensen v. Jensen*, 186.
2. **DECREE OF DIVORCE—SETTING ASIDE WHERE DEFENDANT GUILTY OF ADULTERY.** Where a decree of divorce has been awarded, the court will not set the same aside on the petition of the defendant, where such defendant has been guilty of adultery, as, if a new trial were ordered, the decree would be the same. *Idem.*
3. **SAME—WHEN SET ASIDE—MUST SHOW GROUND OF DEFENSE.** A court will not set aside a decree of divorce on the petition of the defendant unless a reasonable ground of defense is shown. *Idem.*

DIVORCE.

See Annulment of Marriage.

1. **SETTING ASIDE DECREE OF—PROCURING ABSENCE OF DEFENDANT.** Where a party obtains a decree or judgment in the absence of the opposite party, who has been led to believe that his case was not to be heard at the particular time, the court will set such judgment or decree aside where the case was heard in such party's absence. *Jensen v. Jensen*, 186.
2. **SETTING ASIDE WHERE DEFENDANT GUILTY OF ADULTERY.** Where a decree of divorce has been awarded, the court will not set the same aside on the petition of the defendant, where such defendant has been guilty of adultery, as if a new trial were ordered, the decree would be the same. *Idem.*
3. **MUST SHOW GROUND OF DEFENSE.** A court will not set aside a decree of divorce on the petition of the defendant unless a reasonable ground of defense is shown. *Idem.*
4. **ADULTERY OF DEFENDANT.** Where a defendant who is seeking to set aside a decree of divorce is charged with adultery, the court should give such defendant an opportunity to be heard where there is a reasonable doubt about the matter. *Idem.*
5. **ALIMONY—HOW AFFECTED BY ADULTERY.** Where a defendant seeking to set aside a divorce decree is charged with adultery and the illicit relation is apparently continued, the court will not allow alimony. *Idem.*

DURESS.

See Payment, Public Service Corporations, Telephone Companies.

1. **PUBLIC-SERVICE CORPORATION—PAYMENT OF EXCESS CHARGES TO—RIGHT TO RECOVER BACK.** Where a subscriber demands a telephone and he cannot procure the same without yielding to an extortionate demand and signing a contract to pay an excessive

- rate, and he does so yield, this constitutes duress and the excess may be recovered back in an action for money had and received. *Illinois Glass Company v. Chicago Telephone Company*, 579.
2. **COMMON-LAW DOCTRINE—GROWTH OF.** The doctrine of duress at common law was confined originally to duress of the person, but subsequently it was extended to include duress of goods. Under the modern decisions it includes "moral duress" or duress of business necessities. *Idem.*
 3. **EXISTENCE OF ALTERNATIVE OR OTHER LEGAL REMEDY AS BAR TO RECOVERY OF MONEY PAID.** Where a party for a number of years uses an inferior class of telephone service which is usable to the extent that it is possible to carry on a conversation subject to interruption, contracts for a higher grade of service at a rate in excess of that fixed in a city ordinance, the payment of such excess cannot be considered as involuntary where the party paying was not forced to have the better service and it could have obtained relief by applying for an injunction. *Idem.*
 4. **ONLY EXISTS WHERE THERE IS NO ALTERNATIVE.** Where a party is called upon to submit to an illegal demand and he has no other alternative but to submit, such payment cannot be considered as voluntary and he may recover back such amount. *Idem.*
 5. **NECESSITY OF PROTEST.** Where a payment is made under duress, and a protest would be unavailing, no protest need be made. But if a protest would be availing to stop the payment of the money, a protest would be necessary. *Idem.*
 6. **PAYMENTS MADE TO PUBLIC-SERVICE CORPORATION IN EXCESS OF LEGAL RATE.** The plaintiff for a number of years made payments for an improved telephone service in excess of the rates fixed by ordinance. The plaintiff had previously had in his place of business an inferior type of telephone service at the ordinance rate. Both parties believed at the time of making the contract for such excess payment that the telephone company had the right to demand the excess payment. Nothing was said about the relative rights of the parties at the time the contract was made. The defendant was first approached by the plaintiff and the matter was concluded without protest on the part of the plaintiff and without any threat on the part of defendant to disturb the existing telephone service then in operation in plaintiff's place of business. The evidence did not disclose an immediate necessity for the improved telephone service as the inferior service was usable and practically efficient. *Held* that such payments were voluntary and could not be recovered back. *Idem.*
 7. **DURESS DEFINED.** Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. *Idem.*
 8. **CONSCIOUSNESS OF ILLEGALITY OF DEMAND.** To constitute an involuntary payment both parties must have a consciousness that the demand is unlawful at the time of such payment. *Idem.*
 9. **EXERCISE OF FREE WILL.** And where plaintiff in making excess payments was under no immediate necessity of doing so and where nothing was said or done which deprived it of the exer-

cise of its free will, the payments will be considered as voluntary. *Idem.*

10. **SUCCESSIVE PAYMENTS.** Where payments are made successively for nearly five years without any discussion or contention of any sort, and without any protest, or suggestion that the amount was excessive, no recovery can be had. *Idem.*
11. **WHEN PAYMENTS ARE VOLUNTARY—KNOWLEDGE OF RIGHTS.** Money voluntarily paid, without protest, and where there is not present the element of duress, cannot be recovered back, where it appears that the parties either knew or were chargeable with knowledge of their rights, and of the unlawful exaction at the time of payment. This is the rule in tax, water and gas cases without exception. *Idem.*
12. **IGNORANCE OF LEGAL RIGHTS—ALTERNATE REMEDY.** Where plaintiff mistook his legal rights under an ordinance, and in ignorance of the law affecting the contract, freely, tamely and unprotestingly entered into it, and in faith of it uncomplainingly and voluntarily continued for nearly five years to pay the excessive contract price, a condition which could have been relieved by protest or by the aid of an injunction, no recovery could be had. *Idem.*

DUTY. See *Homicide, Negligence, Ordinances, Pleading.*

ELEVATED RAILROADS.

1. **RIGHT TO OCCUPY STREETS.** The right to exist as an elevated railroad was derived by complainant from the state, but the right to occupy any of the streets of the city of Chicago by elevated railroad structures and the extent of such occupation is derived exclusively from the city by virtue of the ordinances granting the rights. *Northwestern Elevated Railroad Company v. City of Chicago, et al.*, 480.
2. **JOINT USE TO EXTEND PLATFORMS.** A provision in the ordinances that the tracks authorized to be laid should be subject to the joint use of other named elevated railroads gives to such elevated railroads no power as to the extension of platforms which is not conferred upon the railroad whose track they use. *Idem.*
3. **EXTENT OF RIGHT OF WAY IN PUBLIC STREET.** An elevated railroad's right of way in the street is confined to so much of the street as is actually occupied by it, and to extend its structure in a public street is an extension of its right of way. *Idem.*
4. **USE OF STREETS EXCLUSIVE.** The use and occupation of the street by an elevated railroad is not in common with the public, but is exclusive. The part of the street above the surface which it occupies is in its exclusive use and that part of the street which is necessary to support the structure is also in its exclusive occupation and for the benefit of the elevated road. *Idem.*
5. **ORDINANCE GRANTING POWERS TO, CONSTRUED MORE STRICTLY THAN ORDINANCE GRANTING POWER TO SURFACE RAILROAD.** The construction of an ordinance as to powers granted an elevated railroad must be construed not only more strictly than one granting powers to a surface street railroad, but it must be held that different principles apply in making such construction. *Idem.*

EMPLOYMENT CONTRACT. See *Contract, Injunction.*

EQUITY.

Dismissal and amendment of bills, see *Injunction*. Parties, see *Parties*. Practice, see *Injunction*. Supplemental bills, see *Injunction*. Motives of complainant as a bar to equitable relief, see *Injunction*.

I

PRINCIPLES OF.

II.

MAXIMS.

III.

INJUNCTION.

IV.

PRACTICE.

I. PRINCIPLES OF-

1. **EQUITY—EXPANSION OF DOCTRINES OF.** The system of equity is so constructed upon comprehensive and fruitful principles that it possesses an inherent capacity of expansion so as to keep abreast of each succeeding age and generation. *Public Grain & Stock Exchange v. Western Union Telegraph Company, et al.*, 548.
2. **BUCKET SHOPS—EQUITABLE AID.** Where the complainant seeks to compel the defendant to furnish it market quotations and it is made to appear that such quotations are desired for the purpose of conducting a "bucket shop" or any other illegal business, a court of equity will not lend its aid for any such purpose. But before relief is denied there must be proof of such fact and not mere suspicion. *Idem*.
3. **QUASI-ESTOPPEL, IN EQUITY—LACHES.** Where complainant in December, 1899, filed his bill for a temporary injunction to restrain the Pullman Company from purchasing the property of the Wagner Company and the motion was denied, and thereafter the Wagner Company was dissolved, and there were large transactions in the sales of the stock of the company, and the complainant stood by and witnessed the stock of the Pullman Company issued for the purchase of the assets of the Wagner Company, traded in publicly for more than a year without further making any move in his suit, he has slept upon his rights, by failing to prosecute his suit, until there has arisen a quasi-estoppel against obtaining relief by injunction, if he was ever entitled to any. *Taylor v. The Pullman Company*, 24.
4. **TRUSTS—WHETHER ACTIVE OR PASSIVE.** A *passive* trust exists as where land is conveyed to A in trust for B without any power to take actual possession of the land or to exercise acts of ownership over it. *Active* trusts exist where the trustee is charged with the performance of active and special duties in respect to the management of the trust property. *Korn, et al. v. Sears, et al.*, 372.

II. MAXIMS.

1. MAXIMS—EX *ÆQUO ET BONO*. The maxim of *ex æquo et bono* is one of equity. *Illinois Glass Company v. Chicago Telephone Company*, 579.
2. SAME—RECOVERY OF MONEY WHICH DEFENDANT IN EQUITY AND GOOD CONSCIENCE OUGHT NOT TO RETAIN. A recovery can not be had in an action at law for money paid merely because the defendant *ex æquo et bono* ought not to retain it. But this maxim may receive an additional exemplification in equity. *Idem*.
3. BONDHOLDERS—RIGHT TO SHARE EQUALLY WITH OTHER CREDITORS—APPLICATION OF MAXIM "HE THAT DOETH INIQUITY SHALL NOT HAVE EQUITY." Bondholders of an insolvent corporation who were also stockholders, but received their stock as a bonus with their subscription for bonds, are entitled to share equally with other creditors in the distribution of the corporate assets, even though they originally paid nothing for their stock. Although the transaction by which they received their stock as a bonus was fraudulent in law, there being no actual fraud, such stockholders cannot be considered as not coming into court "with clean hands." *The Buda Foundry & Manufacturing Company, et al. v. Columbian Celebration Company, et al.*, 398.

III. INJUNCTION.

1. INJUNCTION—DISMISSAL OF BILL—AMENDMENT. If the court is of opinion that the bill, where the sole relief sought is injunction, does not make out a case entitling the party to an injunction, and that it is incapable of amendment so as to entitle the party to the relief sought, the court will, upon motion of either party, dismiss the bill for want of equity. *Taylor v. The Pullman Company*, 24.
2. INJUNCTION NOT GRANTED FOR IMPROPER PURPOSES. The writ of injunction is the strong arm of the court, but it is wielded and controlled by the conscience and discretion of the chancellor, and its use for improper or unlawful purposes will not be permitted. *Idem*.

IV. PRACTICE.

1. EQUITY PRACTICE—MATTER OF DEFENSE ARISING AFTER ISSUE JOINED—HOW RAISED. A new defense arising after issue joined upon answer filed should be brought before the court by means of a cross-bill in the nature of a plea *puis darrein continuance*. *Public Grain & Stock Exchange v. Western Union Telegraph Company*, 562.
2. SAME—There are cases, however, where the new matter has been permitted to be brought in by supplemental answer. *Idem*.
3. SAME—WHEN IMMATERIAL HOW DEFENSE PRESENTED. In many cases it would be immaterial whether new matter is brought before the court by supplemental answer or cross-bill, as for instance, where a release has been obtained after answer filed and the only question raised is as to the fact of execution. *Idem*.
4. SAME—NEW MATTER ARISING AFTER ISSUANCE OF INJUNCTION WHICH WOULD CAUSE DISSOLUTION OF SAME CAN ONLY BE RAISED BY CROSS-BILL. Where an answer has been filed, issue joined

and a motion to dissolve an injunction based upon such answer has been overruled, it would not be correct practice to permit a defendant to come in and set up new matter by means of a supplemental answer, where such new matter would defeat or avoid the injunction. The proper practice is to file a cross-bill. *Idem.*

5. SUPPLEMENTAL ANSWER—BRINGING IN NEW PARTIES BY. No person can be brought into a case by supplemental answer. It must be done by cross-bill. *Idem.*
6. MASTERS IN CHANCERY—SUCCESSORS OF—APPOINTMENT OF SPECIAL COMMISSIONER. The court has the power to appoint a special commissioner to complete the unfinished business of a master in chancery where the term of office of such master has expired, even though a successor has been appointed. *Chellain, et al. v. De Grazie, et al.*, 567.

EQUITABLE ESTATES.

1. EQUITABLE ESTATES—WHAT CONSTITUTES. An equitable estate only exists where the *cestui que use*, or the beneficial owner, has a right to demand an immediate conveyance of the legal title. *Korn, et al. Sears, et al.*, 372.
2. EQUITABLE ESTATE—IN CASE OF ACTIVE TRUST. Where a trustee has the right to take possession and exercise active ownership over the property, the trust is an active trust, and the estate of the *cestui que trust* is not an equitable estate, because the beneficiary has no right to compel or demand the immediate transfer of the legal estate. *Idem.*

ESTATES OF DECEDENTS.

1. LIABILITY OF STOCKHOLDERS—ENFORCEMENT AGAINST ESTATE—PERSONAL REPRESENTATIVES NOT MADE PARTIES. Where an action is instituted to enforce a stockholder's liability, and such stockholder dies during the pendency of the suit, no decree can be rendered against his estate, where his personal representatives have not been made parties. *The Buda Foundry & Manufacturing Company, et al. v. Columbian Celebration Company, et al.*, 398.
2. SAME—ESTATE OF DECEASED STOCKHOLDERS. Where an action is brought to enforce a stockholder's liability and certain stockholders debase during the pendency of the suit, and the suit is not revived by bringing in the executors or administrators of such deceased stockholders within two years from the date of the issuance of the letters, the only decree that can be made against any executor or administrator is that the same be paid out of assets discovered or inventoried after the expiration of said two years. *Idem.*

ESTOPPEL.

See *Laches, Municipal Corporations.*

ULTRA VIRES—ESTOPPEL OF STOCKHOLDER. Where the property of the corporation is leased in violation of the charter any stockholder can enjoin the transaction even though the state could not object. Such right, however, is personal to the stock-

holder, and he may by his acquiescence estop himself and his successors in title from thereafter objecting. *Townsend, et al. v. Chicago Union Traction Company, et al.*, 312.

EVIDENCE.

1. SELF-INCRIMINATION—IMMUNITY. Where the officers of a corporation are compelled to file an affidavit that the corporation is not a member of any trust or combine, and it is provided that no corporation or individual shall be subject to any criminal prosecution by reason of anything truthfully disclosed by such affidavit, the immunity clause is sufficiently broad to protect the corporation and its officers, and such law is not obnoxious to the provisions of section 10, article 2, of the Illinois constitution, which provides that no person shall be compelled in any criminal case to give evidence against himself. *People v. Richards & Kelly Manufacturing Company*, 171.
2. PAROL EVIDENCE—ADMISSIBLE TO SHOW WHAT AGREEMENT REFERRED TO. Where a subscriber for the bonds of a certain corporation is entitled to certain shares of stock as a bonus and no particular shares of stock are designated, parol evidence is admissible to show what particular stock is referred to. *The Buda Foundry & Manufacturing Company, et al. v. Columbian Celebration Company, et al.*, 398.
3. SUBSCRIPTION TO STOCK—EVIDENCE OF. Evidence examined and held sufficient to show that certain defendants were liable as subscribers to the capital stock, even though it was not shown that they actually signed the subscription agreement. *Idem.*
4. LIABILITY OF STOCKHOLDERS—BURDEN OF PROOF. Where complainants in an action to enforce stockholder's liability, show that certain stock which had been transferred to one of the defendants was unpaid stock, the burden of proof is upon such defendant to show that he is a purchaser for value. *Idem.*

EXAMINATION OF BOOKS. See *Corporations*.

EXPRESS COMPANIES. See *Common Carriers*.

EXTRAORDINARY REMEDIES. See *Injunction, Mandamus, Prohibition*.

FEDERAL COURTS.

See *Creditors Bills*.

JURISDICTION OF COURTS—CONFLICT BETWEEN STATE AND FEDERAL.

The pendency in a Federal court, of a creditors' bill filed by certain judgment creditors under which receivers were appointed, with authority to operate the property under the orders of the court, is not a bar to a subsequent proceeding instituted in the state court by minority stockholders, to restrain the corporation, its officers and directors, from entering into and carrying out certain contracts alleged to be *ultra vires*. *Townsend, et al. v. Chicago Union Traction Company, et al.* 312.

FIRE APPARATUS.

1. COMMON-LAW DUTY. In the absence of statute there is no duty on the part of the owner of a building to furnish fire apparatus, or equipment, and where it is not alleged that it was reasonably

necessary or usual and customary to furnish such apparatus, the offense of manslaughter cannot be predicated upon a failure to so equip whereby death was caused. *People v. Davis, et al.*, 217.

2. DUTY TO PROVIDE. There is no duty at common law requiring the owner or occupant of a building to provide fire-escapes and fire apparatus. *People v. Davis*, 245.

FLAG LAW.

1. "FLAG LAW" UNCONSTITUTIONAL. The Illinois statute known as the "Flag Law" prohibiting the use of the national flag for advertising purposes is in derogation of the constitution and void as not being within the police power of the legislature and coming within the category of laws known as class legislation. *People ex. rel. Sontag v. Kruse*, 536.
2. SAME. Relator, agent of the Anheuser-Busch Brewing Ass'n. was arrested for selling beer contained in bottles and barrels upon which appeared the trade mark of the Brewing Ass'n, consisting of a device in which stars and stripes appeared on a shield in connection with an eagle, alleged to be in violation of the Illinois flag law prohibiting the use of the national flag or emblem for advertising purposes. Upon *habeas corpus*, held that the law was unconstitutional and that relator should be discharged from arrest. *Idem*.

FORECLOSURE OF MORTGAGES

1. TAXES—RIGHT OF MORTGAGEE TO PAY. Taxes and assessments are a paramount lien to all others, and a mortgage lien holder, even in the absence of covenant, has the right to pay and discharge such taxes and assessments where the mortgagor fails to do so. *Sperry v. Stinson*, 288. (Judgment reversed, 174 Ill. 125.)
2. RIGHT TO REDEEM. A mortgage lien holder may redeem from tax sales and buy up tax certificates and tax titles after the time for redemption had expired, paying a reasonable consideration therefor. The amount so paid, with interest, can be recovered in the foreclosure proceedings. *Idem*.
3. MORTGAGEE AS PURCHASER AT TAX SALE—RIGHTS OF. There is nothing in the mortgage contract which prevents the mortgagee from purchasing the premises at a tax sale. But neither the mortgagor nor the mortgagee are allowed to obtain any advantage, the one over the other, by reason of any such purchase, nor will such purchase be allowed to ripen into an adverse title as against the other party, or those in privity with him. *Idem*.
4. SEVEN YEARS PAYMENT OF TAXES. Nor can payment of taxes by the mortgagee or the mortgagor in possession be relied upon as payment of taxes under color of title under the seven-year Limitation Act. *Idem*.
5. PAYMENT OF TAXES BY MORTGAGEE. The mortgagee has the right to pay taxes and add the amount thereof to the mortgage debt. A purchase of a tax sale is not a payment of taxes, nor is the purchase of a tax certificate a payment of taxes or a redemption. *Idem*.

6. **RIGHTS OF MORTGAGEE HOLDING TAX CERTIFICATE.** Where a mortgagee becomes a purchaser at a tax sale he is in the position of any other purchaser with all the incidents and obligations imposed by the statute. *Idem.*
7. **TAXES—PAYMENT OF BY TAX PURCHASER IN SUCCEEDING YEARS.** If a mortgagee holding a tax certificate fails to pay the next year's taxes and the property is sold, the mortgagor has the right to redeem from the first sale by paying only the amount for which the land was sold. *Idem.*
8. **RIGHTS OF MORTGAGORS.** Where a mortgagee purchases a tax certificate the mortgagor has the right of election, whether the mortgagee shall be considered as a purchaser or as holding the tax certificate for the benefit of the mortgagor. *Idem.*

FORGERY.

1. **FORGERY—ALTERATION OF PROCEEDINGS OF CITY COUNCIL.** The defendants were indicted under the statute of Illinois for forgery for altering the printed records of the city council of Chicago in reference to its action on a certain report of the commissioner of public works relating to the construction of certain tunnels and conduits of the Illinois Telephone and Telegraph Company. The report was in fact ordered by said city council to be "placed on file" but the printed record of the city council was changed so as to read "which was on motion of Ald. Novak (8th ward) *duly approved* and placed on file." *Held* that this constituted a forgery of a record or other authentic matter of a public nature by which a pecuniary demand or obligation or a right in property is or purports to be created, conveyed, transferred, diminished or destroyed with intent to damage and defraud some person, body politic or corporate, constituting the statutory crime of forgery. *People v. Wheeler, et al.*, 387; *contra, People v. Loeffler, et al.*, 381.
2. **PUBLIC RECORDS, WHEN SUBJECTS OF FORGERY.** A public record or other authenticated matter of a public nature, to be the subject of forgery must be one that affects a pecuniary demand or obligation, or property right; and this must be manifest on the face of the document itself, or by averment in the indictment of extrinsic facts which show that it is of such a character. *People v. Loeffler, et al.*, 381.
3. **FORGERY—INSTRUMENT FORGED MUST BE ADMISSIBLE IN EVIDENCE.** To be the subject of forgery the instrument must be admissible in evidence, but the converse of the proposition does not follow that any instrument which is admissible in evidence for any purpose may be the subject of forgery. *Idem.*
4. **FORGERY—PUBLIC RECORDS—MUST AFFECT PROPERTY RIGHTS.** The alteration of the public record in question could not constitute forgery since it did not affect any property right. *Idem.*

FRANCHISES.

Grants of franchises in public streets—contruction of, see *Municipal Corporations, Elevated Railroads.*

1. **PRIVILEGES AND FRANCHISES—CONSTRUCTION OF GRANTS OF.** Grants of special rights and privileges in a public street should

be strictly construed in favor of the public and against the grantee of the privilege. *Northwestern Elevated Railroad Company v. City of Chicago, et al.*, 480.

2. **CITIES—POWER TO SELL FRANCHISES IN PUBLIC STREETS.** The court is inclined to the opinion that the city is without power (even by the joint action of the mayor and aldermen) to sell or barter away any franchise in the public streets for a compensation to be paid into the city treasury. The city as a public trustee of the streets is subject to the rule applying to all trustees, whether individuals or corporations, and that is that a trustee cannot control trust property for his or its own benefit. The city has power to exact a reasonable license fee for compensation for the extra cost it may be put to and the supervision and the use of its police made necessary by such use of its streets, but it cannot speculate or make money for its treasury, or its taxpayers, out of its exercise of the power to control the public streets as a trustee for the public. *Idem.*

FRAUD.

1. **PAYMENT OF SUBSCRIPTION IN PROPERTY—GOOD FAITH OF DIRECTORS.** To constitute a valid payment of a stock subscription by the transfer of property, there must be good faith on the part of the directors. The law does not require infallible judgment, but where the evidence shows an intentional overvaluation or any device to obtain possession of the stock without fully paying for it, the transaction will be deemed fraudulent in law and in fact. *The Buda Foundry & Manufacturing Company, et al. v. Columbian Celebration Company, et al.*, 398.
2. **FRAUDULENT PAYMENT OF SUBSCRIPTION.** Where certain inventions are turned over to a corporation in payment of a subscription to its stock and a large part of such stock is turned back into the treasury of the corporation to be used for promotional purposes, such transaction will be considered as fraudulent both in law and in fact. *Idem.*

FRONTAGE CONSENTS.

1. **STREET RAILROADS—FRONTAGE CONSENTS.** Under the act of March 30, 1887, it is necessary to the validity of a grant of the city council to a street railroad of the right to use the streets that the petition upon which the council acts shows the consent of a majority of the owners of all private property in each mile and any fraction thereof petitioning for the construction of the road. If the petition shows such majority the action of the city council cannot be attacked except for fraud. *Vanderpoel v. The West and South Town Street Railway Company*, 299.
2. **INJUNCTION—CONSTRUCTION OF RAILROAD.** A property owner cannot maintain a bill to restrain the construction of a railway track in a public street. The injury is to the public and a private individual cannot file a bill on behalf of the public. *Idem.*
3. **UNAUTHORIZED CONSTRUCTION.** Even though the railroad is being laid without valid municipal authority or ordinance, a property owner cannot maintain a bill for an injunction. It must be left to the municipal authorities to remedy the wrong. *Idem.*

4. **EFFECT OF FRONTAGE LAW.** The frontage law was intended, however, to provide a remedy for the property owner where there is an unauthorized invasion of a street by a railroad company. *Idem.*
5. **MAJORITY CONSENT.** But this remedy cannot be availed of where the majority of the frontage of the mile in which the complainant's property is located petitions for the laying of the railroad. This is true even though the ordinance is otherwise invalid. *Idem.*
6. **FRONTAGE CONSENTS—PROPERTY OF STEAM RAILROAD NOT CONSIDERED.** In determining whether a majority of the abutting owners have consented to the laying of a street railroad, the frontage occupied by a steam railroad abutting on such street should not be taken into consideration in determining the total frontage, as steam railroads are considered as public highways. *Idem.*

HOMICIDE.

See *Criminal Law*.

1. **MANSLAUGHTER—VIOLATION OF ORDINANCE OR STATUTE.** The mere violation of an ordinance or statute whereby death ensues does not of itself subject the wrongdoer to punishment for manslaughter. *People v. Davis*, 245.
2. **MANSLAUGHTER—COMMISSION OF UNLAWFUL ACT.** A person cannot be held liable for the crime of manslaughter merely because at the time of the killing he was engaged in an unlawful act, unless the unlawful act or omission was in its nature wrongful independent of statutory enactment, or unless the natural consequences of the unlawful act or omission are dangerous to life or limb, or the act is *malum in se*. *Idem.*
3. **MANSLAUGHTER—DUE CAUTION AND CIRCUMSPECTION—QUESTION FOR JURY.** It is a question for the jury to determine whether the defendants used due caution and circumspection in failing to equip a theater with fire apparatus and equipment as required by law, whereby death is caused. *Idem.*
4. **CRIMINAL NEGLIGENCE—LEGAL DUTY.** A defendant cannot be found guilty of manslaughter on account of alleged negligence in omitting to perform an act unless the law imposed a legal duty upon him to perform such act, or unless such duty had been directly assumed by contract or otherwise. *People v. Davis, et al.*, 217.
5. **COMMON-LAW DUTY.** In the absence of statute there is no duty on the part of the owner of a building to furnish fire apparatus, and where it is not alleged that it was reasonably necessary or usual and customary to furnish such apparatus, the offense of manslaughter cannot be predicated upon a failure to so equip whereby death was caused. *Idem.*
6. **ASSUMED DUTY.** An allegation that the defendants had undertaken the care, charge, management and control of a theater building and stage and that it became the duty of the defendants to see that the ordinances and laws in relation to the installation of fire apparatus and equipment were complied with is not a sufficient allegation that the defendants had assumed or taken upon themselves the duty imposed upon the owner or lessee of the building to furnish such fire apparatus and equipment. *Idem.*
7. **ORDINANCES—DUTY UNDER.** An ordinance which provides that every building of a certain class shall be equipped with certain

fire apparatus and equipment, but which does not specifically designate the person by whom the duty shall be performed, cannot be made the basis of an indictment for manslaughter against the manager, business manager, or stage carpenter, of a theater for criminal negligence in failing to comply with such ordinances, whereby death was caused. *Idem.*

8. PROXIMATE CAUSE—FAILURE TO SUPPLY FIRE APPARATUS. Where a fire was caused in a theater building by a spark from an electric light placed in close proximity to certain draperies upon the stage, and a large number of persons are burned to death, an indictment for manslaughter cannot be sustained for negligence in failing to equip the building with fire apparatus and equipment. The fire will be considered the proximate cause of the death, and not the failure to supply the fire apparatus and equipment, even though it is alleged that if such apparatus and equipment were installed, the fire would have been extinguished. *Idem.*
9. MANSLAUGHTER—PROXIMATE CAUSE. The unlawful act or omission must have been the proximate cause of the death. *Idem.*
10. PROXIMATE CAUSE OF DEATH—FAILURE TO SUPPLY FIRE-ESCAPES. Where an ordinance providing that theaters shall be supplied with fire apparatus and equipment is not complied with, and a fire breaks out and death is caused, the failure to comply with such ordinance is the proximate cause of the death. *People v. Davis*, 245.
11. "UNLAWFUL ACT"—DEFINED. The words "unlawful act," as used in the statute defining manslaughter, means unlawful as defined by the common law, and includes not only criminal acts, but trespasses and civil wrongs which are not prohibited by statute. *Idem.*
12. INVOLUNTARY MANSLAUGHTER—WILFUL ACT. It is a serious question whether the offense of voluntary manslaughter can be "wilfully" committed. *People v. Davis, et al.*, 217.
13. NEGLIGENCE—MANSLAUGHTER. If a death occurs through the negligent use of dangerous agencies it is manslaughter. But the negligence to be "unlawful" must amount to an omission of a legal duty and not a mere neglect of a social or moral duty. *Idem.*

HUSBAND AND WIFE. See *Divorce*.

IGNORANCE OF LAW.

MUNICIPAL ORDINANCES—IGNORANCE OF, ONE OF LAW. An ordinance granting to a telephone company the right to use the streets of the city,—in which ordinance it is provided that the telephone company shall not increase its established rates for telephone service—has the force of law within the limits of the municipality, and ignorance of the provisions of such ordinance is ignorance of law and not of fact. *Illinois Glass Company v. Chicago Telephone Company*, 579.

INDIANS—children of as citizens. See *Citizenship*.

INDICTMENT.

See *Criminal Law, Homicide*.

ALLEGATIONS OF INDICTMENT. An argumentative averment of fact is not sufficient in an indictment. *People v. Davis, et al.*, 217.

2. **INDICTMENT—CONCLUSIONS.** An allegation that if certain fire equipment had been provided as required by an ordinance, a fire could have been extinguished, is a mere conclusion of the pleader. *Idem.*
3. **INDICTMENT—CONCLUSIONS IN.** In an indictment the *facts* constituting the offense must be set out. The indictment cannot be aided by the averment of conclusions of law or fact. *Idem.*
4. **MOTION TO QUASH AT COMMON LAW.** At common law a motion to quash an indictment was addressed to the sound discretion of the court. *Idem.*
5. **RULE IN ILLINOIS.** But in Illinois error may be assigned upon the overruling of a motion to quash, and it is the duty of the court to quash if the indictment is insufficient to sustain a conviction. *Idem.*

INJUNCTION.

Right to restrain construction of street railroad, see *Street Railroads, Frontage Consents.*

I.

SUBJECTS OF RELIEF BY INJUNCTION.

II.

MANDATORY INJUNCTION.

III.

PRACTICE AND PLEADING.

1. SUBJECTS OF RELIEF BY INJUNCTION.

1. **CONSTRUCTION OF RAILROAD.** A property owner cannot maintain a bill to restrain the construction of a railway track in a public street. The injury is to the public and a private individual cannot file a bill on behalf of the public. *Vanderpoel v. The West and South Town Street Railway Company*, 299.
2. **UNAUTHORIZED CONSTRUCTION.** Even though the railroad is being laid without valid municipal authority or ordinance, a property owner cannot maintain a bill for an injunction. It must be left to the municipal authorities to remedy the wrong. *Idem.*
3. **AWNINGS OVER SIDEWALK.** Where the defendants under the authority of a city ordinance erect an awning over the sidewalk in front of their premises, and such awning does not interfere with public travel, an adjoining property owner is not entitled to an injunction restraining the maintenance of such awning. *F. S. Webster Company v. Frank, et al.*, 530.
4. **INTERFERENCE WITH VIEW.** As to any interruption of complainant's facilities of outlook in the sense of view merely, it is well settled that injunction will not lie as mere interference with prospect is not an incident of the estate, and there is no remedy in the absence of a contract. *Idem.*
5. **TRADE-MARKS AND TRADE NAMES—DISTINCTION—RIGHT TO EXCLUSIVE USE OF TRADE NAME.** "Trade-mark" and "trade name" are nearly synonymous. There is no exclusive right in a trade name unless such name has the distinguishing qualities of a trade-mark and is used to distinguish the goods, wares and

- merchandise of the user. *New York Dental Parlors v. Froon, et al.*, 460.
6. **TRADE NAME—INFRINGEMENT—NECESSITY OF.** In the absence of fraud, deception or unfair competition, the user of a trade name cannot enjoin its use by others. *Idem.*
 7. **TRADE-MARKS—GEOGRAPHICAL NAME.** A geographical name or term cannot be protected as an exclusive trade-mark. They must be supplemented by other words which import quality or standard. *Idem.*
 8. **TRADE-MARKS—MISLEADING NAME.** Where complainants use a geographical name which is misleading, the court will not protect such name as a trade-mark. *Idem.*
 9. **BUSINESS PLANS AND SYSTEMS—INJUNCTION AGAINST USE OF.** The complainants commenced issuing in serial parts a portfolio of sights and scenes of the world. These parts were issued and distributed under contract by certain newspapers in exchange for coupons clipped from such newspapers. This plan was originated by the complainants and proved to be a great success. The defendants thereafter issued a similar book and adopted substantially the same plan in doing its business. The parts were not copyrighted and the original pictures were purchased in the open market. *Held*, there being no copyright, trade-mark or trade name involved, that a court of equity would not grant relief, as there can be no proprietary right merely in a plan of doing business. *The Werner Company v. W. B. Conkey Company, et al.*, 91.
 10. **INJUNCTION TO RESTRAIN CRIME.** A court of equity has no jurisdiction to restrain the commission of a crime, nor to enforce moral obligations, nor can it rightfully interfere with the performance of an illegal act, merely because it is illegal, in the absence of any injury to property rights. *People ex rel. v. Chicago Fair Grounds Ass'n*, 108.
 11. **INJUNCTION TO RESTRAIN NUISANCE AT SUIT OF PRIVATE INDIVIDUAL.** Where private individuals suffer an injury quite distinct from that of the public in general, by consequence of a public nuisance, they are entitled to an injunction and relief in equity. *Idem.*
 12. **INJUNCTION ON APPLICATION OF ATTORNEY GENERAL.** The attorney general, on his own motion, in behalf of the state, may institute proceedings by information in chancery to prevent obstructions or to abate nuisances on the public highways, streets, bays or harbors, as citizens have in them a vested right of enjoyment and user; but the state, as father of the people, and guardian of public morals, cannot institute such action in the absence of property rights or other interests conferring jurisdiction. *Idem.*
 13. **INJUNCTION TO RESTRAIN ULTRA VIRES CORPORATE ACTS.** A corporation can exercise only such powers and privileges as its charter confers; if it transcends its charter powers the state can elect to proceed at law to annul the charter or in chancery to enjoin it from acting *ultra vires*. *Idem.*
 14. **PUBLIC SERVICE CORPORATIONS—DISCRIMINATION—REMEDY AGAINST.** Where a public service corporation discriminates in its dealings with the public there is no remedy at law, and a court of equity will exercise jurisdiction and issue a mandatory injunction to prevent such discriminations. *The Public Grain and Stock Exchange v. Western Union Telegraph Company, et al.*, 548.

15. **TELEPHONE COMPANIES.** Subscribers are entitled to an injunction restraining a telephone company from interfering with their telephone service, even though they have attached foreign equipment to their lines, conditioned, however, upon such subscribers removing such foreign attachments. *Beach, et al., v. Chicago Telephone Company*, 158.
16. **INJUNCTION—CONTRACTS IN RESTRAINT OF TRADE—COMPLAINANT'S REMEDY.** Where a person is not a party to a contract in restraint of trade, he has no standing to call upon a court of equity to interfere. The remedies imposed by the legislature for violations of the anti-trust laws ought to be pursued, and where the matter is not the construction or the enforcement of a contract between the parties who appear in the court, a court of equity ought not to take jurisdiction. *Platt v. National Association of Retail Druggists*, 1.
17. **INJUNCTION TO COMPEL COURSE OF DEALING WILL NOT LIE.** There is no way in which a court of equity can make one man trade with another. If a merchant puts himself in a position where he holds himself out to sell to everybody on the same terms, it may be that an action at law will lie against the merchant for any damages that a party may sustain to whom he refuses to sell, but there is no method of proceeding in equity to make that merchant sell to that individual unless he wants to. He may refuse to trade with him from mere caprice. *Idem.*
18. **COURTS OF EQUITY—SUPERVISORY POWER OF.** A court of equity cannot undertake to supervise the entire wholesale drug trade in a city and see that the wholesalers sell goods to complainant or any one else. *Idem.*
19. **TEMPORARY INJUNCTION—WHAT THE COURT WILL CONSIDER IN GRANTING.** The court, in granting an application for a temporary injunction, must always look upon what may be called the balance of equity or of damages. *Idem.*

II. MANDATORY INJUNCTION.

1. **INJUNCTION TO COMPEL PERFORMANCE OF PERSONAL SERVICES.** A court of equity will not by its writ of injunction, compel the performance of purely personal services. Thus where a person leases a boarding house, in consideration of the making of a monthly payment of \$200 in cash, and \$25 a month in board and lodging to be furnished to the lessor, and the lessee refuses to furnish such board and threatens to eject the lessor from the premises, the court cannot interfere by injunction, as there is a complete and adequate remedy at law. *Hayden v. Kelly*, 22.
2. **SAME—REMEDY—DAMAGES.** In such a case the lessor would be entitled to recover as damages the amount stipulated in the lease as to the value of the board, viz.: \$25 a month. *Idem.*
3. **MANDATORY INJUNCTION AGAINST COMMON CARRIERS.** When complainants are frequent shippers and a continuous series of shipments is necessary in conducting their business, a mandatory injunction is the proper remedy to compel common carriers to perform their duties and carry goods tendered for transportation, since actions at law would result in a multiplicity of suits. *Marshall Field & Co. v. Becklenberg*, 59.

III. PRACTICE AND PLEADING.

1. **DISMISSAL OF BILL—AMENDMENT.** If the court is of opinion that the bill, where the sole relief sought is injunction, does not

- make out a case entitling the party to an injunction, and that it is incapable of amendment so as to entitle the party to the relief sought, the court will, upon motion of either party, dismiss the bill for want of equity. *Taylor v. The Pullman Company*, 24.
2. **SUPPLEMENTAL BILL—EFFECT OF.** A motion for leave to file a supplemental bill, and for a temporary injunction, is a waiver of a prior motion for a temporary injunction, and takes the place thereof. *Idem*.
 3. **PRACTICE—RENEWAL OF MOTION FOR INJUNCTION.** Where a motion for an injunction, or to dissolve one, is passed upon by one branch of the court, it is an improper practice to renew such motion based upon the same identical pleadings and evidence, before another branch of the court. *Idem*.
 4. **SUPPLEMENTAL BILL AFTER DENIAL OF ORIGINAL APPLICATION FOR INJUNCTION.** If after the decision of the original motion for an injunction new facts arise concerning the matter in dispute, the party has a right to renew his motion for an injunction and base the same upon the pre-existing facts and pleadings in the cause and upon the new matters which are set forth in the supplemental bill. *Idem*.
 5. **MOTIVE OF COMPLAINANT IN FILING BILL FOR INJUNCTION.** Upon a motion for a temporary injunction by a stockholder of a corporation to enjoin it from purchasing the property of another corporation—the issuance of which is largely a matter of discretion of the chancellor—the court would cease to be a court of equity and conscience if it did not take into consideration the motive of the complainant, or the real party in interest in instituting the suit. *Idem*.
 6. **INJUNCTION NOT GRANTED FOR IMPROPER PURPOSES.** The writ of injunction is the strong arm of the court, but it is wielded and controlled by the conscience and discretion of the chancellor, and its use for improper or unlawful purposes will not be permitted. *Idem*.
 7. **INJUNCTION—ANNULLING PAST ACTS.** Where a bill is filed to restrain the doing of a certain act, the doing of which should and would have been enjoined, but for the intervening injunction of a Federal court, it is the duty of the court to issue the injunction to annul such acts, upon the dissolution of the restraining order in the Federal court. *Townsend, et al. v. Chicago Union Traction Company, et al.*, 312.
 8. **NEW MATTER ARISING AFTER ISSUANCE OF INJUNCTION WHICH WOULD CAUSE DISSOLUTION OF SAME CAN ONLY BE RAISED BY CROSS-BILL.** Where an answer has been filed, issue joined and a motion to dissolve an injunction based upon such answer has been overruled, it would not be correct practice to permit a defendant to come in and set up new matter by means of a supplemental answer, where such new matter would defeat or avoid the injunction. The proper practice is to file a cross-bill. *Public Grain & Stock Exchange v. Western Union Telegraph Company*, 562.
 9. **RESTRAINING BREACH OF CONTRACT—RULES APPLICABLE.** In an application for an injunction to restrain an employe from violating a contract not to engage in a particular business for three years after the termination of his employment, the decisions governing courts of equity as to decreeing specific performance of contracts should control. *Oppenheimer v. Sayer*, 74.

10. **DAMAGES—BOND.** Where the question is solely one of damages, or the right of complainant is not clear, the court may deny an injunction and require the defendant to give bond to secure the complainant against loss or damage. *Vanderpoel, et al. v. The West & South Towns Street Railway Company*, 299.
11. **MOTIVE OF COMPLAINANTS.** The court will consider the motives of complainants where there is evidence that the litigation is not being prosecuted in good faith and for the protection of complainants' rights, and the complainants withhold information which would enable the court to pass upon the charge. Under such circumstances where complainants' rights are otherwise doubtful, an injunction will be denied. *Idem.*
12. **LACHES.** A bill will not lie to restrain the construction of a street railway where the complainant delayed until a considerable portion of such railway had been constructed. *Idem.*

INSANE PERSON.

INSANE PERSON—EQUITABLE JURISDICTION TO APPOINT TEMPORARY RECEIVER UNTIL APPOINTMENT OF CONSERVATOR BY PROBATE COURT. Where it appears that a person is insane and incapable of managing his property and business, *held* that a court of equity has power to appoint a temporary receiver until the probate court has appointed a conservator for him. *Morris, by his next friend, v. Roughan (Rowan)*, 525.

INVOLUNTARY MANSLAUGHTER.

See *Criminal Law, Homicide.*

INVOLUNTARY MANSLAUGHTER—WILFUL ACT. It is a serious question whether the offense of voluntary manslaughter can be "wilfully" committed. *People v. Davis, et al.*, 217.

JUDICIAL CONSTRUCTION.

JUDICIAL CONSTRUCTION—ANALOGIES. Analogies are dangerous in judicial construction. *Northwestern Elevated Railroad Company v. City of Chicago*, 480.

JUDICIAL NOTICE.

ORDINANCES—JUDICIAL NOTICE—PLEADING. The rule is well settled in Illinois that courts will not take judicial notice of city ordinances, nor are such ordinances admissible in evidence unless properly pleaded. *People v. Davis, et al.*, 217.

JURISDICTION. See *Courts.*

LACHES.

As a bar to relief, see *Street Railroads*. As a bar to stockholders' suit, see *Corporations*.

1. **LACHES.** A bill will not lie to restrain the construction of a street railway where the complainant delayed until a considerable portion of such railway had been constructed. *Vanderpoel, et al. v. The West and South Towns Street Railway Company*, 299.

2. **SAME—KNOWLEDGE OF ORDINANCE.** Such laches is not excused because the complainant did not know of the invalidity of the ordinance. The complainant is chargeable with notice of any defects, in the petition of the property owners, the proceedings of the city council, or the city ordinance, which are apparent on the face thereof. *Idem.*
3. **QUASI-ESTOPPEL IN EQUITY—LACHES.** Where complainant in December, 1899, filed his bill for a temporary injunction to restrain the Pullman Company from purchasing the property of the Wagner Company and the motion was denied, and thereafter the Wagner Company was dissolved, and there were large transactions in the sales of the stock of the company, and the complainant stood by and witnessed the stock of the Pullman Company issued for the purchase of the assets of the Wagner Company, traded in publicly for more than a year without further making any move in his suit, he has slept upon his rights, by failing to prosecute his suit, until there has arisen a quasi-estoppel against obtaining relief by injunction, if he was ever entitled to any. *Taylor v. The Pullman Company*, 24.
4. **LACHES.** Where a stockholder takes no action to protect his rights for over four years, and no sufficient reason appears why he did not do so, he is guilty of laches. *Fahrig v. Milwaukee & Chicago Breweries, Limited, et al.*, 296.

LIMITATIONS.

1. **WHEN CAUSE OF ACTION ACCRUES.** The words "when a cause of action has arisen," as they occur in the statute of limitations pleaded, mean when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, or in other words when the plaintiff has the right to sue the defendant in the courts of the state, upon the particular cause of action without regard to the place of its origin. *Hyman v. McVeigh* (Supreme Court), 577.
2. **PLEAS—STATUTE OF LIMITATION.** Pleas of the statute of limitations of a foreign state are not subject to demurrer in not alleging the continued residence of the defendant in the foreign state, it not appearing that any exception is made by the law of such foreign state as pleaded as against those who depart the state after the statute of limitations begins to run. If the statute makes such an exception the proper course is to reply and not to demur. *Idem.*
3. **IN ACTION TO ENFORCE STOCKHOLDER'S LIABILITY—WHEN A BAR.** A bill was filed to enforce stockholders' liability and a demurrer was sustained thereto and the bill dismissed. Upon appeal the judgment was reversed. The defendant was not notified of the redocketing of the case within five years as required by law. *Held* that the statute of limitations was a bar to the action. *Buda Foundry & Manufacturing Company, et al. v. Columbian Celebration Company, et al.*, 398.

LIS PENDENS.

LIS PENDENS TO PURCHASERS OF CORPORATE STOCK. Where the complainant in a suit to restrain a corporation from purchasing the assets of a rival concern has not prosecuted his suit in good faith with all reasonable diligence and without unneces-

sary delay, purchasers of the stock of the purchasing corporation issued while the suit for a temporary injunction was pending cannot be held to have taken the stock with constructive notice of the pendency of the suit and subject to future proceedings therein. *Taylor v. The Pullman Company*, 24.

MAJORITY.

1. **MAJORITY OF STOCKHOLDERS—WHAT CONSTITUTES.** The directors of a street railway company made a lease of the company's right of way, contingent upon the approval of a majority of the stockholders and provided for the calling of a special meeting of the stockholders "for the purpose of considering and voting upon the question of approving the action of the board of directors." Part of the stock, the property of the lessee, was held in trust under a deposit agreement, to secure the performance of the lease. *Held* that such deposited stock was incapable of being legally voted by the trustee, and therefore should not be taken into consideration in determining whether a majority of the outstanding stock had voted in favor of the lease. *Townsend, et al., v. Chicago Union Traction Company, et al.*, 312.
2. **CORPORATIONS—ACQUISITION OF STOCK IN OTHER CORPORATIONS.** It is against public policy for one corporation to acquire a *majority* of stock of another corporation for the purpose of controlling it. The holding of stock in other corporations for some purposes is not necessarily *ultra vires*. *Idem*.

MANDAMUS.

1. **MANDAMUS NOT GRANTED TO COMPEL PUBLIC OFFICERS TO ENFORCE THE LAWS.** Certain residents of the village of Harlem presented a petition for a writ of *mandamus*, alleging that gambling, betting and gaming were going on within the limits of the village of Harlem, and particularly at the race track in that village, in violation of the laws of the state of Illinois and of the village ordinance of Harlem, and that the chief of police, the president of the village and the village board of trustees, though often notified of the aforesaid violations of the laws and ordinances, refused to enforce said laws and ordinances, and suppress gambling, betting and gaming within the village limits; a peremptory writ of *mandamus* was prayed for against the president of the village of Harlem, the trustees and the chief of police "commanding them and each of them that they perform their respective and co-operative duties of their respective public village offices of the said village of Harlem and take such action and institute such proceedings as are necessary to enforce the police laws and ordinances of the said village of Harlem, and the laws of the state of Illinois against gambling, betting and gaming within the limits of the said village of Harlem." *Held*, that *mandamus* was not the proper remedy, and that a writ of *mandamus* could not be issued for such a purpose, because for the court to undertake to exercise the power of controlling matters of this nature would be to ignore the other powers of the government, the executive and the legislative, and to usurp and put into the court's own hand

all the powers given to all the officers of government. It would be practically to substitute the court for all other officers and would result in judicial tyranny. *People ex rel. v. Mohr*, 100.

2. **MANDAMUS WILL NOT ISSUE TO COMPEL PUBLIC OFFICIALS TO DO THEIR DUTY GENERALLY.** *Mandamus* is not issued to command a public official generally to do his duty and to comply with the law of the land. His duty is fixed by the statute; the statute commands and it is his duty to obey the commands of the statute. *Mandamus* can only issue to command the performance or the doing of a specific act, not that the officer shall perform all his duties, or perform all the acts required by his office, but that he shall perform some specified act. *Idem*.

MANSLAUGHTER. See *Criminal Law, Homicide*.

MARKET QUOTATIONS. See *Board of Trade, Telegraph Companies*.

MARRIAGE.

ANNULMENT OF MARRIAGE ON GROUND THAT ONE OF THE CONTRACTING PARTIES IS UNDER THE AGE OF LEGAL CONSENT. In Illinois the age of legal consent to marriage is seventeen years in males and fourteen years in females. The complainant was married to the defendant while he was under the age of seventeen years and ceased to cohabit with her before he arrived at that age. Upon a bill filed by him to annul such marriage it was held that the marriage was voidable, and that inasmuch as complainant had not cohabited with defendant after he arrived at the age of consent, he was entitled to disaffirm the contract of marriage and have the same annulled. *Crawford v. Crawford*, 453.

MASSES.

See *Trusts*.

1. **TRUSTS—MASSES FOR THE SOUL—STATUTE OF FRAUDS.** The decedent deeded certain personal property, upon oral directions that the fund should be devoted to the procurement of masses for the soul of the decedent and his mother. *Held*, that the trust was not void because not wholly in writing, as the statute of frauds does not embrace trusts as to personal property, but only as to realty. *Kehoe v. Kehoe, et al.*, 164.
2. **MASSES FOR THE SOUL—SUPERSTITIOUS USES.** At common law gifts or devises for procuring masses are void, as being for superstitious uses. *Idem*.
3. **SAME—ENGLISH STATUTES.** The English statutes concerning the disposition of property for superstitious uses are inapplicable to our conditions and inconsistent with our institutions, and never became a part of our law. The origin of the Illinois statutes as to the adoption of the common law traced. *Idem*.
4. **SAME—RELIGIOUS BELIEF.** The right of a person to devote his property to what he conceives is a religious purpose, such as the procurement of masses for the soul, is just as necessary to the religious liberty guaranteed by the constitution, as the right to believe and worship according to the dictates of one's own conscience. *Idem*.
5. **SAME.** A bequest for the procurement of masses for the donor's soul is a valid bequest. *Idem*.

MASTERS IN CHANCERY.

MASTERS IN CHANCERY—SUCCESSORS OF—APPOINTMENT OF SPECIAL COMMISSIONER. The court has the power to appoint a special commissioner to complete the unfinished business of a master in chancery where the term of office of such master has expired even though his successor has been appointed. *Chetlain, et al. v. De Grazie, et al.*, 567.

MAXIMS.

MAXIMS—EX ÆQUO ET BONO. The maxim of *ex æquo et bono* is one of equity. *Illinois Glass Company v. Chicago Telephone Company*, 579.

MINISTERS, children of as citizens. See *Citizenship*.

MISJOINDER.

1. **MISJOINDER.** The manager of a theater and building, the business manager of such theater and the stage carpenter thereof, cannot be joined in an indictment for manslaughter for an alleged failure to equip such theater and building and the stage thereof with certain fire apparatus and equipment. *People v. Davis, et al.*, 217.
2. **MISJOINDER.** Whether several defendants who are charged with failure to perform several duties can be joined in the one indictment, doubted. *Idem*.

MONOPOLIES.

See *Combinations and Monopolies*.

MONOPOLIES—DESTRUCTION OF COMPETITION. Neither the establishing of monopolies nor the destruction of competition are looked upon with favor by the courts. *Public Grain & Stock Exchange v. Western Union Telegraph Company, et al.*, 548.

MORTGAGES.

1. **TAXES—RIGHT OF MORTGAGEE TO PAY.** Taxes and assessments are a paramount lien to all others, and a mortgage lien holder, even in the absence of covenant, has the right to pay and discharge such taxes and assessments where the mortgagor fails to do so. *Sperry v. Stinson*, 288 (judg. rev'd, 174 Ill. 125).
2. **SAME—RIGHT TO REDEEM.** A mortgage lien holder may redeem from tax sales and buy up tax certificates and tax titles after the time for redemption has expired, paying a reasonable consideration therefor. The amount so paid, with interest, can be recovered in the foreclosure proceedings. *Idem*.
3. **MORTGAGEE AS PURCHASER AT TAX SALE—RIGHTS OF.** There is nothing in the mortgage contract which prevents the mortgagee from purchasing the premises at a tax sale. But neither the mortgagor or the mortgagee are allowed to obtain any advantage, the one over the other, by reason of any such purchase, nor will such purchase be allowed to ripen into an ad-

- verse title as against the other party, or those in privity with him. *Idem.*
4. SAME—SEVEN YEARS' PAYMENT OF TAXES. Nor can payment of taxes by the mortgagee or the mortgagor in possession be relied upon as payment of taxes under color of title under the seven-year Limitation Act. *Idem.*
 5. SAME—PAYMENT OF TAXES BY MORTGAGEE. The mortgagee has the right to pay taxes and add the amount thereof to the mortgage debt. A purchase at a tax sale is not a payment of taxes, nor is the purchase of a tax certificate a payment of taxes or a redemption. *Idem.*
 6. SAME—RIGHTS OF MORTGAGEE HOLDING TAX CERTIFICATE. Where a mortgagee becomes a purchaser at a tax sale he is in the position of any other purchaser with all the incidents and obligations imposed by the statute. *Idem.*
 7. TAXES—PAYMENT OF BY TAX PURCHASER IN SUCCEEDING YEARS. If a mortgagee holding a tax certificate fails to pay the next year's taxes and the property is sold, the mortgagor has the right to redeem from the first sale by paying only the amount for which the land was sold. *Idem.*
 8. SAME—RIGHTS OF MORTGAGORS. Where a mortgagee purchases a tax certificate the mortgagor has the right of election, whether the mortgagee shall be considered as a purchaser or as holding the tax certificate for the benefit of the mortgagor. *Idem.*
 9. TAXES—SALE OF VIGINTILLIONTH INTEREST. The sale of a vigintillionth of certain land for the non-payment of taxes is not a cloud upon the title, and a mortgagee redeeming from such a sale cannot charge the amount so paid against the mortgagor. The maxim, *de minimus non curat lex*, applies. *Idem.*
 10. TAX SALES. The rule of *caveat emptor* is applicable to tax sales. *Idem.*
 11. TRUST DEED—ASSIGNEE OF—SUBJECT TO EQUITIES. The assignee of a mortgage or trust deed takes it subject to existing equities between mortgagor and mortgagee. *Chetlain, et al. v. De Grazie, et al.*, 567.
 12. SAME—NOTICE TO GRANTOR. The assignee of a mortgage or trust deed in order to protect his rights against secret equities between mortgagor and mortgagee, must give notice to the grantor in such mortgage. *Idem.*
 13. SAME—PAYMENTS TO TRUSTEE IN TRUST DEED. Payments made to trustee by the mortgagor before maturity without notice from the holder of the note secured by such trust deed, will be applied as a credit on such note, in a bill to foreclose the trust deed. *Idem.*
 14. DEBTOR AND CREDITOR—CREATING RELATION BETWEEN TRUSTEE AND MORTGAGOR BY RECITALS IN RECEIPT FOR MONEY. A trustee by accepting payments on account of an indebtedness secured by a trust deed cannot create the relation of debtor and creditor between himself and the mortgagor by recitals in receipts given on account of such indebtedness. *Idem.*
 15. NOTICE OF TRANSFER OF NOTE SECURED BY TRUST DEED—SUFFICIENCY OF. A general notice from the holder of a note secured by a trust deed to pay a negotiable interest coupon to him is not a sufficient notice that he is also the holder of the principal note. *Idem.*

MOTION TO QUASH. See *Indictment, Criminal Law, Homicide.*

MOTIVE.

Wrongful motive as a bar to relief. See *Infjunction*.

1. MOTIVE OF COMPLAINANT IN FILING BILL FOR INJUNCTION. Upon a motion for a temporary injunction by a stockholder of a corporation to enjoin it from purchasing the property of another corporation—the issuance of which is largely a matter of discretion of the chancellor—the court would cease to be a court of equity and conscience if it did not take into consideration the motive of the complainant, or the real party in interest in instituting the suit. *Taylor v. The Pullman Company*, 24.
2. MOTIVE OF COMPLAINANTS. The court will consider the motives of complainants where there is evidence that the litigation is not being prosecuted in good faith and for the protection of complainants' rights, and the complainants withhold information which would enable the court to pass upon the charge. Under such circumstances where complainants' rights are otherwise doubtful, an injunction will be denied. *Vanderpoel, et al. v. The West and South Towns Street Railway Company*, 299.

MUNICIPAL CORPORATIONS.

See *Ordinances, Street Railroads*.

I.

CONTRACTS.

II.

FRANCHISES.

III.

ORDINANCES.

IV.

POLICE POWER.

V.

STREETS.

I. CONTRACTS.

ESTOPPEL—ULTRA VIRES CONTRACTS. No estoppel can be placed upon the city for its action under an *ultra vires* contract. *Northwestern Elevated Railway Company v. City of Chicago, et al.*, 480.

II. FRANCHISES.

1. CAN GRANT FRANCHISE ON STREETS ONLY BY ORDINANCE. The charter of the city of Chicago (city and village act) is silent as to the mode in which the council may grant a franchise for the use of the streets, but such a franchise cannot be conferred by a mere resolution of the council but must be by ordinance on the passage of which the yeas and nays must be taken, which must receive a majority vote of all the members elect of the council, be submitted to the mayor for his approval, and be

transcribed upon the records of the city. *People v. Loeffler, et al.*, 381.

2. **POWER TO SELL FRANCHISES IN PUBLIC STREETS.** The court is inclined to the opinion that the city is without power (even by the joint action of the mayor and aldermen) to sell or barter away any franchise in the public streets for a compensation to be paid into the city treasury. The city as a public trustee of the streets is subject to the rule applying to all trustees, whether individuals or corporations, and that is that a trustee cannot control trust property for his or its own benefit. The city has power to exact a reasonable license fee for compensation for the extra cost it may be put to and the supervision and the use of its police made necessary by such use of its streets, but it cannot speculate or make money for its treasury, or its taxpayers, out of its exercise of the power to control the public streets as a trustee for the public. *Northwestern Elevated Railroad Company v. City of Chicago*, 480.
3. **PRIVILEGES AND FRANCHISES—CONSTRUCTION OF GRANTS OF.** Grants of special rights and privileges in a public street should be strictly construed in favor of the public and against the grantee of the privilege. *Idem.*

III. ORDINANCES.

1. **WHETHER PUBLIC LAWS OR PRIVATE CONTRACTS.** An ordinance which grants to a telephone company the right to use the streets and which regulates the rates to be charged for telephone service within the city, is not a mere private or business contract between the city and the telephone company, but is an exercise of the sovereign power of the state delegated to the city by its charter. *Illinois Manufacturers Association, et al. v. Chicago Telephone Company*, 119.
2. **PRACTICAL CONSTRUCTION—ESTOPPEL AND ACQUIESCENCE.** There can be no estoppel against the enforcement of an ordinance which is a public law, by reason of any practical construction placed thereon by the parties or by acquiescence in such practical construction. *Idem.*
3. **LEGISLATIVE INTENT—ASCERTAINMENT OF.** The legislative intent is to be ascertained, in the first place, from the terms of the ordinance, and in the second place, by the application of such terms to the subject matter. *Northwestern Elevated Railroad Company v. City of Chicago, et al.*, 480.
4. **AMBIGUITY—PRACTICAL CONSTRUCTION BY EXECUTIVE OFFICERS.** Where there is an ambiguity in a law or ordinance, practical construction given the same by executive officers charged with its execution should be considered, and when the acts are repeated, and for a considerable length of time, they may have great and even controlling weight, and under certain circumstances, may be conclusive by way of equitable estoppel. *Idem.*
5. **PRACTICAL CONSTRUCTION OF BY EXECUTIVE OFFICERS MUST BE OF SAME ORDINANCE.** The practical construction of executive officers must rise from acts done under the law or ordinance to be construed, and not under other ordinances or laws. *Idem.*
6. **WHEN CITY BOUND BY PRACTICAL CONSTRUCTION OF.** There could be no practical construction and no acquiescence which would bind the city without knowledge, either actual or presumed, of the city council of such acts of practical construction of ordinances by executive officers of the city. *Idem.*

7. **CITY COUNCIL—POWER TO PASS ORDINANCE AS TO ERECTION OF AWNING.** The city council under the power to "regulate the use of streets for signs, awnings, awning posts," etc., is authorized to permit the erection of awnings over sidewalks. *F. S. Webster Company v. Frank, et al.*, 530.
8. **REQUIRING IDENTIFICATION NUMBERS ON AUTOMOBILES, VALIDITY OF ORDINANCE.** An ordinance of the city of Chicago requiring all automobiles operated in the city of Chicago to display for identification, numbers and letters as provided in the ordinance, *held*, upon an application for an injunction against its enforcement, to be a valid exercise of the general police power of the city, in connection with the express power to regulate the use of the streets. *Slade, et al. v. City of Chicago*, 520.

IV. POLICE POWER.

1. **AUTOMOBILES—POLICE POWER OF CITY OVER.** The automobile is a class unto itself and no reason can be perceived why the police power shall not be exercised as to any specific class. And it is a proper exercise of the police power and of the power to regulate the streets, for the city council to place them under such restrictions as will enable the police to enforce against them the penalty for exceeding the speed allowed by the city ordinance, and also to enable the police to enforce other restrictions, such as in regard to lights, the observance of the laws of the road by such vehicles, etc. *Slade, et al. v. City of Chicago*, 520.
2. **POLICE POWER OF CITIES.** The police power of the state is delegated to the cities under section 62 of the city and village act. *Idem.*
3. **EXERCISE OF BY CITIES—WHEN A JUDICIAL QUESTION.** It is for the city council to determine when an exigency exists for the exercise of the police power, but what are the subjects of its exercise is clearly a judicial question. The exercise of legislative discretion is not subject to review by the courts when the measures adopted are calculated to secure the public comfort, safety or welfare, but the measure so adopted must have some relation to the ends specified. *Idem.*
4. **EXTENT OF.** The city council has no power under the guise of police regulation to arbitrarily invade the personal rights and personal liberty of the individual citizen. It cannot, in the exercise of the police power, prohibit an act which is harmless in itself, or pass an ordinance which unnecessarily or arbitrarily interferes with the right of the citizen to use the public streets. *Idem.*

V. STREETS.

1. **ELEVATED RAILROADS—RIGHT TO OCCUPY STREETS.** The right to exist as an elevated railroad was derived by complainant from the state, but the right to occupy any of the streets of the city of Chicago by elevated railroad structures and the extent of such occupation is derived exclusively from the city by virtue of the ordinances granting the rights. *Northwestern Elevated Railroad Company v. City of Chicago, et al.*, 480.
2. **STREETS—CONTROL OF BY CITIES.** It has always been the policy of the state of Illinois that the municipalities should have the control of the streets within their limits. As regards the title of the streets, the fee is vested in the city, but it owns and controls the streets as trustee only. *Idem.*

3. **ORDINANCES GRANTING RIGHTS IN STREETS—RULE OF CONSTRUCTION.** The same rule of construction that would be applied to an act of the general assembly of the state granting the right of a railroad to occupy public highways should be applied to an ordinance of the city of Chicago granting rights and privileges in regard to the occupation of the street by a railroad company. *Idem.*
4. **ORDINANCES GRANTING USE OF STREETS—FORCE AND EFFECT OF.** An ordinance granting rights and privileges in regard to the occupation of the streets by a railroad company has all the force and effect of a statute law as to the right of the railroad company to use the street and as to the manner in which it shall occupy the same. *Idem.*
5. **ENCROACHMENTS ON—RIGHT OF PUBLIC TO LIGHT AND AIR.** The public have the right to insist that light and air shall penetrate every part of a street, not only to the surface but above the surface, and every encroachment upon such street, whether upon the surface or above the surface or below the surface, between such lot lines, is against the common right to the public; that the same shall be kept free and unobstructed. *Idem.*
6. **CITY HOLDS TITLE AS TRUSTEE.** The city holds the fee and the control of the streets as a trustee for the public, and in its control of the streets its ownership is subordinate to its duties as a trustee. It is not a trustee for the inhabitants of the city, but a trustee holding and controlling the streets for the public use. *Idem.*
7. **OBSTRUCTIONS IN—POWER OF CITY TO AUTHORIZE.** It is not every obstruction of a street or sidewalk that is illegal. If the obstruction is authorized by the municipality and is properly constructed so as not to interfere with the public use of the street or sidewalk, it is not to be regarded as a nuisance. But it is indispensable that the street or sidewalk be left free for the public use and in as safe a condition as it would have been without such obstruction. *F. S. Webster Company v. Frank, et al.*, 530.
8. **AWNINGS OVER SIDEWALK.** Where the defendants under the authority of a city ordinance erect an awning over the sidewalk in front of their premises, and such awning does not interfere with public travel, an adjoining property owner is not entitled to an injunction restraining the maintenance of such awning. *Idem.*
9. **INTERFERENCE WITH VIEW.** As to any interruption of complainant's facilities of outlook in the sense of view merely, it is well settled that injunction will not lie as mere interference with prospect is not an incident of the estate, and there is no remedy in the absence of a contract. *Idem.*
10. **STREETS—MANNER OF USE—CITY COUNCIL MAY PRESCRIBE.** The manner of the use of the streets is for the city council to prescribe, and where such city council by a general ordinance authorizes the erection of awnings over a public sidewalk no complaint can be made. *Idem.*

NEGLIGENCE.

See Homicide, Ordinances, Proximate Cause.

1. **FIRE APPARATUS—DUTY TO PROVIDE.** There is no duty at common law requiring the owner or occupant of a building to provide fire-escapes and fire apparatus. *People v. Davis*, 245.

2. **PLACES OF AMUSEMENT—DUTY TO PROVIDE SAFE PLACE.** Proprietors of places of amusement are bound to provide a safe place for their patrons and to exercise reasonable care for their safety. *Idem.*
3. **DUTY—NECESSITY OF.** Where there is no duty imposed either by law or contract upon a particular person to do a particular act no penalty can be imposed upon him for his non-performance. The duty must be a plain one and the person who must perform it must be specifically designated. *Idem.*
4. **CAUSA PROXIMA NON REMOTA SPECTATUR.** It is elementary that to establish liability for the doing of an unlawful act, the wrong must be the direct and proximate cause of the injury. *Idem.*
5. **PROXIMATE CAUSE OF DEATH—FAILURE TO SUPPLY FIRE-ESCAPES.** Where an ordinance providing that theaters shall be supplied with fire apparatus and equipment is not complied with, and a fire breaks out and death is caused, the failure to comply with such ordinance is the proximate cause of the death. *Idem.*
6. **NEGLIGENCE—VIOLATION OF ORDINANCE.** The violation of an ordinance is *prima facie* evidence of negligence. *Idem.*
7. **FIRE ORDINANCES.** Upon whom duty to equip buildings with fire apparatus rests. *People v. Davis, et al.*, 217.
8. **NEGLIGENCE—MANSLAUGHTER.** If a death occurs through the negligent use of dangerous agencies it is manslaughter. But the negligence to be "unlawful" must amount to an omission of a legal duty and not a mere neglect of a social or moral duty. *Idem.*
9. **FIRE ORDINANCES—UPON WHOM DUTY FALLS.** Where city ordinances prescribe that buildings of a certain class shall be equipped with fire apparatus, equipment, etc., but fail to designate the person upon whom the duty rests, it will be presumed that it was the intention of the city council to impose such duties upon the owner or lessee of the building. *Idem.*
10. **ORDINANCES—DUTY UNDER.** An ordinance which provides that every building of a certain class shall be equipped with certain fire apparatus and equipment, but which does not specifically designate the person by whom the duty shall be performed, cannot be made the basis of an indictment for manslaughter against the manager, business manager or stage carpenter of a theater for criminal negligence in failing to comply with such ordinances, whereby death was caused. *Idem.*
11. **CRIMINAL NEGLIGENCE—LEGAL DUTY.** A defendant cannot be found guilty of manslaughter on account of alleged negligence in omitting to perform an act unless the law imposed a legal duty upon him to perform such act, or unless such duty had been directly assumed by contract or otherwise. *Idem.*

NEGOTIABLE INSTRUMENTS.

PAYMENTS TO TRUSTEE IN TRUST DEED. Payments made to trustee by the mortgagor before maturity without notice from the holder of the note secured by such trust deed, will be applied as a credit on such note, in a bill to foreclose the trust deed. *Chetlain, et al. v. De Grazie, et al.*, 567.

NOTICE.

NOTICE OF TRANSFER OF NOTE SECURED BY TRUST DEED—SUFFICIENCY OF. A general notice from the holder of a note secured

by a trust deed to pay a negotiable interest coupon to him is not a sufficient notice that he is also the holder of the principal note. *Chetlain, et al. v. De Grazie, et al.*, 567

NUISANCES.

INJUNCTION TO RESTRAIN NUISANCE AT SUIT OF PRIVATE INDIVIDUAL.

Where private individuals suffer an injury quite distinct from that of the public in general, by consequence of a public nuisance, they are entitled to an injunction and relief in equity. *People ex rel. v. Chicago Fair Grounds Association*, 108.

ORDINANCES.

Violation of as evidence of negligence, see *Negligence*. Violation of as manslaughter, see *Homicide*. See also *Municipal Corporations*.

1. DUTY TO UPHOLD. It is the duty of courts to so construe all legislative enactments as to uphold their validity and constitutionality if it can reasonably be done. The same rule applies to ordinances. *People v. Davis*, 245.
2. DUTY TO COMPLY WITH. Although an ordinance providing for the installation of certain fire apparatus in buildings of a certain class fails to designate the person who shall perform the duty, it is a violation of the ordinance to use and occupy a building constructed in violation of the law, without complying with the ordinance. *Idem*.
3. INVALID, WHERE SUBJECT TO APPROVAL OF NON-OFFICIAL BODY. Where an ordinance, which provides that every building of a certain class shall be equipped with a fire sprinkler equipment, makes the installation of such equipment subject to the approval of a non-official body, the requirement in regard to such approval is invalid. *Idem*.
4. WHETHER ENTIRE ORDINANCE INVALID. Where an ordinance is entire, and each part has a general influence over the rest, and one part of it is void, the entire ordinance is void. The void part of the ordinance makes the whole ordinance void if the void and valid parts are so connected as to be essential to each other. If the invalid part can be separated from the other provisions of the law, and the purpose and intent of the legislature remains plain and effective, the invalid part may be disregarded. *Idem*.
5. SAME. The provision in the ordinance requiring the approval of the non-official body may be disregarded without impairing in any degree the purpose or usefulness of the law. *Idem*.
6. FIRE ORDINANCES—UPON WHOM DUTY FALLS. Where city ordinances prescribe that buildings of a certain class shall be equipped with fire apparatus, equipment, etc., but fail to designate the person upon whom the duty rests, it will be presumed that it was the intention of the city council to impose such duties upon the owner or lessee of the building. *People v. Davis, et al.*, 217.
7. JUDICIAL NOTICE—PLEADING. The rule is well settled in Illinois that courts will not take judicial notice of city ordinances, nor are such ordinances admissible in evidence unless properly pleaded. *Idem*.
8. ORDINANCES—DUTY UNDER. An ordinance which provides that every building of a certain class shall be equipped with certain fire apparatus and equipment, but which does not specifically

- designate the person by whom the duty shall be performed, cannot be made the basis of an indictment for manslaughter against the manager, business manager or stage carpenter of a theater for criminal negligence in failing to comply with such ordinances, whereby death was caused. *Idem.*
9. PROXIMATE CAUSE—FAILURE TO SUPPLY FIRE APPARATUS. Where a fire was caused in a theater building by a spark emitted from an electric light placed in close proximity to certain draperies upon the stage, and a large number of persons are burned to death, an indictment for manslaughter cannot be sustained for negligence in failing to equip the building with fire apparatus and equipment. The fire will be considered the proximate cause of the death, and not the failure to supply the fire apparatus and equipment, even though it is alleged that if such apparatus and equipment were installed the fire would have been extinguished. *Idem.*
 10. RULE OF CONSTRUCTION. As a general rule the courts will construe statutes as declaratory of the common law and not in derogation of it. And when words are used in a statute which have a well known meaning at common law, the courts will give such words their common-law meaning. *Idem.*
 11. MANSLAUGHTER—VIOLATION OF ORDINANCE OR STATUTE AS MANSLAUGHTER. The mere violation of an ordinance or statute whereby death ensues does not of itself subject the wrongdoer to punishment for manslaughter. *People v. Davis*, 245.
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bind the city without knowledge, either actual or presumed, of the city council of such acts of practical construction of ordinances by executive officers of the city. *Idem.*

19. **ELEVATED RAILROADS—ORDINANCE GRANTING POWERS TO, CONSTRUED MORE STRICTLY THAN ORDINANCE GRANTING POWER TO SURFACE RAILROAD.** The construction of an ordinance as to powers granted an elevated railroad must be construed not only more strictly than one granting powers to a surface street railroad, but it must be held that different principles apply in making such construction. *Idem.*
20. **TELEPHONE COMPANIES—DUTY TO FURNISH MODERN EQUIPMENT AT RATES FIXED BY ORDINANCE.** Where a telephone company accepts an ordinance under which it is permitted to use the streets of the city for the purpose of placing its poles and wires, and it is provided in such ordinance that the company shall not increase the rates then established for telephone service, the company is bound to furnish telephones of modern construction and appliances at the ordinance rate. *Illinois Glass Company v. Chicago Telephone Company*, 579.
21. **MUNICIPAL ORDINANCES—IGNORANCE OF IS ONE OF LAW.** An ordinance granting to a telephone company the right to use the streets of the city,—in which ordinance it is provided that the telephone company shall not increase its established rates for telephone service—has the force of law within the limits of the municipality, and ignorance of the provisions of such ordinance is ignorance of law and not of fact. *Idem.*

PAYMENTS.

Recovery back, see also *Duress, Telephone Companies*.

1. **PAYMENT IN EXCESS OF RATE FIXED BY ORDINANCE—WHETHER VOLUNTARY.** Where a public service corporation exacts charges in excess of those allowed by law, the payment of such charges is not regarded as voluntary, nor is the making of any protest or objection necessary in order to recover back such excess charges. *Illinois Manufacturers' Association, et al. v. Chicago Telephone Company*, 119.
2. **DURESS — PUBLIC-SERVICE CORPORATION — PAYMENT OF EXCESS CHARGES TO—RIGHT TO RECOVER BACK.** Where a subscriber demands a telephone and he cannot procure the same without yielding to an extortionate demand and signing a contract to pay an excessive rate, and he does so yield, this constitutes duress and the excess may be recovered back in an action for money had and received. *Illinois Glass Company v. Chicago Telephone Company*, 579.
3. **DURESS—COMMON-LAW DOCTRINE—GROWTH OF.** The doctrine of duress at common law was confined originally to duress of the person, but subsequently it was extended to include duress of goods. Under the modern decisions it includes "moral duress" or duress of business necessities. *Idem.*
4. **SAME—WHAT CONSTITUTES—EXISTENCE OF ALTERNATIVE OR OTHER LEGAL REMEDY AS BAR TO RECOVERY OF MONEY PAID.** Where a party for a number of years uses an inferior class of telephone service which is usable to the extent that it is possible to carry on a conversation subject to interruption, contracts for a higher grade of service at a rate in excess of that fixed in a city ordinance, the payment of such excess cannot be considered as

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- involuntary where the party paying was not forced to have the better service and it could have obtained relief by applying for an injunction. *Idem.*
5. DURESS—ONLY EXISTS WHERE THERE IS NO ALTERNATIVE. Where a party is called upon to submit to an illegal demand and he has no other alternative but to submit, such payment cannot be considered as voluntary and he may recover back such amount. *Idem.*
 6. SAME—NECESSITY OF PROTEST. Where a payment is made under duress, and a protest would be unavailing no protest need be made. But if a protest would be availing to stop the payment of the money, a protest would be necessary. *Idem.*
 7. DURESS—WHAT CONSTITUTES—PAYMENTS MADE TO PUBLIC-SERVICE CORPORATION IN EXCESS OF LEGAL RATE. The plaintiff for a number of years made payments for an improved telephone service in excess of the rates fixed by ordinance. The plaintiff had previously had in his place of business an inferior type of telephone service at the ordinance rate. Both parties believed at the time of making the contract for such excess payment that the telephone company had the right to demand the excess payment. Nothing was said about the relative rights of the parties at the time the contract was made. The defendant was first approached by the plaintiff and the matter was concluded without protest on the part of the plaintiff and without any threat on the part of defendant to disturb the existing telephone service then in operation in plaintiff's place of business. The evidence did not disclose an immediate necessity for the improved telephone service as the inferior service was usable and practically efficient. *Held* that such payments were voluntary and could not be recovered back. *Idem.*
 8. DURESS DEFINED. Duress exists when one by the unlawful act of another is induced to make a contract to perform some act under circumstances which deprive him of the exercise of free will. *Idem.*
 9. SAME—CONSCIOUSNESS OF ILLEGALITY OF DEMAND. To constitute an involuntary payment both parties must have a consciousness that the demand is unlawful at the time of such payment. *Idem.*
 10. SAME—EXERCISE OF FREE WILL. And where plaintiff in making excess payments was under no immediate necessity of doing so and where nothing was said or done which deprived it of the exercise of its free will, the payments will be considered as voluntary. *Idem.*
 11. SAME—SUCCESSIVE PAYMENTS. Where payments are made successively for nearly five years without any discussion or contention of any sort, and without any protest, or suggestion that the amount was excessive, no recovery can be had. *Idem.*
 12. SAME—WHEN PAYMENTS ARE VOLUNTARY—KNOWLEDGE OF RIGHTS. Money voluntarily paid, without protest, and where there is not present the element of duress, cannot be recovered back, where it appears that the parties either knew or were chargeable with knowledge of their rights, and of the unlawful exaction at the time of payment. This is the rule in tax, water and gas cases without exception. *Idem.*
 13. SAME—IGNORANCE OF LEGAL RIGHTS—ALTERNATE REMEDY. Where plaintiff mistook his legal rights under an ordinance, and in ignorance of the law affecting the contract, freely, tamely and

unprotestingly entered into it, and in faith of it uncomplainingly and voluntarily continued for nearly five years to pay the excessive contract price, a condition which could have been relieved by protest or by the aid of an injunction, no recovery could be had. *Idem.*

14. RECOVERY OF MONEY WHICH DEFENDANT IN EQUITY AND GOOD CONSCIENCE OUGHT NOT TO RETAIN. A recovery can not be had *in an action at law* for money paid merely because the defendant *ex aequo et bono* ought not to retain it. But this maxim may receive an additional exemplification in equity. *Idem.*

PARTIES.

1. RECEIVERS—NOT NECESSARY PARTIES TO STOCKHOLDERS' SUIT. The receivers of a corporation are not necessary to parties to a minority stockholders' suit where the controversy relates to the voting power of certain stock held by a trustee, the legality of an election of, and the extent of the power of directors, etc. *Townsend, et al. v. Chicago Union Traction Co., et al.*, 312.
2. CESTUI QUE TRUST. A *cestui que trust* is not a necessary party to litigation in which he is represented by the trustee. *Idem.*
3. PARTIES—WHO ARE NECESSARY IN BILL TO COMPEL TELEGRAPH COMPANY TO FURNISH COMPLAINANT WITH MARKET QUOTATIONS OF BOARD OF TRADE. Where a bill is filed to compel a telegraph company to furnish market quotations of the board of trade, gathered by the telegraph company on the floor of such board, and it is averred that the board of trade claims such quotations as its private property and has forbidden the telegraph company to furnish the same to complainant, such board has a direct interest in the litigation and is therefore a necessary party to the suit. *Public Grain & Stock Exchange v. Western Union Telegraph Company*, 562.
4. PARTIES—UNORGANIZED CORPORATION. Where the certificate of final organization of a corporation has not been filed in the recorder's office as required by statute, it is not necessary to make such corporation a party defendant in a bill to enjoin the recording of the certificate, as by so doing the complainant would admit that it was an existing corporation. *Elgin National Watch Company v. Eppenstein, et al.*, 602.
5. LACK OF NECESSARY PARTIES. The holders of the stock of a defendant company issued during the pendency of the suit, for the purchase of certain property, are necessary parties to a supplemental bill proposed to be filed for the purpose of restraining a purchase of such property and in the absence of such stockholders a motion for a temporary injunction will be denied. *Taylor v. The Pullman Company*, 24.

PARTNERSHIP.

1. PARTNERSHIP—COMPENSATION OF PARTNERS. Each partner is under obligation to devote his skill and effort to the promotion of the business of the firm. In the absence of special agreement, one partner is not entitled to any special compensation for services in prosecuting the partnership business, even though such partner has greater industry or ability than his co-partners, *Curtis v. Palmer*, 70.
2. SAME—SURVIVING PARTNERS. The same rule applies as to the services of a surviving partner as between him and the representatives of a deceased partner. *Idem.*

3. **SAME—EXTRAORDINARY SERVICES.** Where a surviving partner renders unusual or extraordinary services in preserving the partnership estate, or where the surviving partner devotes his whole time to the business and carries it on successfully, he is entitled to charge a reasonable sum for his services. *Idem.*

PLEADING.

1. **ASSUMED DUTY.** An allegation that the defendants had undertaken the care, charge, management and control of a theater building and stage and that it became the duty of the defendants to see that the ordinances and laws in relation to the installation of fire apparatus and equipment were complied with, is not a sufficient allegation that the defendants had assumed or taken upon themselves the duty imposed upon the owner or lessee of the building to furnish such fire apparatus and equipment. *People v. Davis, et al.*, 217.
2. **ALLEGATION AS TO DUTY.** An allegation that it was the duty of a defendant to perform certain acts is a mere conclusion of the pleader. *Idem.*
3. **EQUITY PRACTICE—MATTER OF DEFENSE ARISING AFTER ISSUE JOINED—HOW RAISED.** A new defense arising after issue joined upon answer filed should be brought before the court by means of a cross-bill in the nature of a plea *puis darrein continuance*. *Public Grain & Stock Exchange v. Western Union Telegraph Company*, 562.
4. **SAME.** There are cases, however, where the new matter has been permitted to be brought in by supplemental answer. *Idem.*
5. **SAME—WHEN IMMATERIAL HOW DEFENSE PRESENTED.** In many cases it would be immaterial whether new matter is brought before the court by supplemental answer or cross-bill, as for instance, where a release has been obtained after answer filed and the only question raised is as to the fact of execution. *Idem.*
6. **SUPPLEMENTAL ANSWER—BRINGING IN NEW PARTIES BY.** No person can be brought into a case by supplemental answer. It must be done by cross-bill. *Idem.*
7. **PLEAS—STATUTE OF LIMITATION.** Pleas of the statute of limitations of a foreign state are not subject to demurrer in not alleging the continued residence of the defendant in the foreign state, it not appearing that any exception is made by the law of such foreign state as pleaded as against those who depart the state after the statute of limitations begins to run. If the statute makes such an exception the proper course is to reply and not to demur. *Hyman v. McVeigh* (Supreme Court), 577.

POLICE POWER.

1. **POLICE POWER OF CITIES.** The police power of the state is delegated to the cities under section 62 of the city and village act. *Slade, et al., v. City of Chicago*, 520.
2. **EXERCISE OF BY CITIES—WHEN A JUDICIAL QUESTION.** It is for the city council to determine when an exigency exists for the exercise of the police power, but what are the subjects of its exercise is clearly a judicial question. The exercise of legis-

lative discretion is not subject to review by the courts when the measures adopted are calculated to secure the public comfort, safety or welfare, but the measure so adopted must have some relation to the ends specified. *Idem.*

3. **POWER OF CITIES, EXTENT OF.** The city council has no power under the guise of police regulation to arbitrarily invade the personal rights and personal liberty of the individual citizen. It cannot, in the exercise of the police power, prohibit an act which is harmless in itself, or pass an ordinance which unnecessarily or arbitrarily interferes with the right of the citizen to use the public streets. *Idem.*

PRACTICAL CONSTRUCTION OF ORDINANCES. See *Municipal Corporations, Ordinances.*

PRACTICE

1. **COURTS—CORRECTION OF RECORD.** The court in the exercise of its equitable power may properly correct its records and amend its orders and judgments, even after the term at which the order was entered has gone by. Such amendments, however, must be made from the minutes of the judge. *Pinkerton, et al. v. Grand Pacific Hotel Company*, 517.
2. **SAME—BY WHOM MADE.** The power to amend the record of the court rests only in the particular court where the error occurred. *Idem.*
3. **TEMPORARY INJUNCTION—WHAT THE COURT WILL CONSIDER IN GRANTING.** The court, in granting an application for a temporary injunction, must always look upon what may be called the balance of equity or of damages. *Platt v. National Association of Retail Druggists*, 1.

PROHIBITION.

1. **AGAINST COUNTY COURT.** The county court is not such an "inferior court" as a court to which the circuit court could issue its writ of prohibition. *People ex rel. Lindauer v. Prendergast*, 308.
2. **MATTER OF DOUBT.** Where the court has any doubt whatever as to its own jurisdiction over the county court that is sufficient cause of itself for the denial of the writ of prohibition. *Idem.*
3. **APPEALS FROM COUNTY COURT.** The fact that the appellate court has appellate jurisdiction over the county court, while the appellate jurisdiction of the circuit court over the county court is doubtful, is a sufficient reason for refusing the writ of prohibition. *Idem.*
4. **EFFECT OF RIGHT OF APPEAL.** In a case where the right of appeal or writ of error exists, the writ of prohibition is not a writ of right *ex debito justitiæ*, but it issues *ex gratia* resting in the sound legal discretion of the court and depending upon the circumstances of each particular case. *Idem.*
5. **WHEN WRIT ISSUES.** The writ of prohibition should never issue except in a clear case of usurpation of jurisdiction, and then only in case of extreme necessity. *Idem.*

PROTEST—necessity of in action to recover back excessive charges. See *Duress, Payments.*

PROXIMATE CAUSE.

See Negligence, Homicide, Ordinances.

1. **PROXIMATE CAUSE. TO CONSTITUTE MANSLAUGHTER.** The unlawful act or omission must have been the proximate cause of the death. *People v. Davis, et al.*, 217.
2. **FAILURE TO SUPPLY FIRE APPARATUS.** Where a fire was caused in a theater building by a spark emitted from an electric light placed in close proximity to certain draperies upon the stage, and a large number of persons are burned to death, an indictment for manslaughter cannot be sustained for negligence in failing to equip the building with fire apparatus and equipment. The fire will be considered the proximate cause of the death, and not the failure to supply the fire apparatus and equipment, even though it is alleged that if such apparatus and equipment were installed, the fire would have been extinguished. *Idem.*
3. **CAUSA PROXIMA NON REMOTA SPECTATUR.** It is elementary that to establish liability for the doing of an unlawful act, the wrong must be the direct and proximate cause of the injury. *People v. Davis*, 245.

PUBLIC OFFICERS.

1. **MANDAMUS NOT GRANTED TO COMPEL PUBLIC OFFICERS TO ENFORCE THE LAWS.** Certain residents of the village of Harlem presented a petition for a writ of *mandamus*, alleging that gambling, betting and gaming were going on within the limits of the village of Harlem, and particularly at the race track in that village, in violation of the laws of the state of Illinois and of the village ordinance of Harlem, and that the chief of police, the president of the village and the village board of trustees, though often notified of the aforesaid violations of the laws and ordinances, refused to enforce said laws and ordinances, and suppress gambling, betting and gaming within the village limits; a peremptory writ of *mandamus* was prayed for against the president of the village of Harlem, the trustees and the chief of police "commanding them and each of them that they perform their respective and co-operative duties of their respective public village offices of the said village of Harlem and take such action and institute such proceedings as are necessary to enforce the police laws and ordinances of the said village of Harlem, and the laws of the state of Illinois against gambling, betting and gaming within the limits of the said village of Harlem." *Held*, that *mandamus* was not the proper remedy, and that a writ of *mandamus* could not be issued for such a purpose, because for the court to undertake to exercise the power of controlling matters of this nature would be to ignore the other powers of the government, the executive and the legislative, and to usurp and put into the court's own hand all the powers given to all the officers of government. It would be practically to substitute the court for all other officers and would result in judicial tyranny. *People ex rel. v. Mohr*, 100.
2. **MANDAMUS WILL NOT ISSUE TO COMPEL PUBLIC OFFICIALS TO DO THEIR DUTY GENERALLY.** *Mandamus* is not issued to command a public official generally to do his duty and to comply with the law of the land. His duty is fixed by the statute; the statute

commands and it is his duty to obey the commands of the statute. *Mandamus* can only issue to command the performance or the doing of a specific act, not that the officer shall perform all his duties, or perform all the acts required by his office, but that he shall perform some specified act. *Idem*.

PUBLIC POLICY.

See *Contracts, Combinations and Monopolies*.

1. **DEFINED.** By public policy is intended that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed a policy of the law or public policy in the administration of the law. *Taylor v. The Pullman Company*, 24.
 2. **COURTS CANNOT DECLARE THAT AGAINST PUBLIC POLICY WHICH THE STATE PERMITS TO BE DONE.** The courts cannot permit that to be declared against public policy which the state permits to be done. To permit the courts to declare that to be illegal and void which is authorized by the legislature of the state, would be to substitute the courts for the legislature. *Idem*.
 3. **LEASE OF RAILROAD.** If the public policy or statutory law of the state permits a corporation to execute a lease, neither the state nor any stockholder can object. *Townsend, et al. v. Chicago Union Traction Company, et al.*, 312.
 4. **PUBLIC POLICY OF ILLINOIS AS TO MONOPOLIES.** From a review of the anti-trust statutes of Illinois and of the acts passed by the legislature in 1897 it would seem that the public policy of the state of opposition to combinations and monopolies in Illinois has changed to a policy favoring combinations and monopolies. *Taylor v. The Pullman Company*, 24.
 5. **COMBINATIONS AND MONOPOLIES—CONSTRUCTION OF LAWS REGULATING.** The laws of trade appear to be almost as irresistible as the laws of nature. These combinations are the evolution of trade and appear to be demanded by the present economic conditions. Such laws as the legislature deem it necessary to enact in that regard should be strictly construed and enforced in favor of the public; but the constitutional right to own property and contract with reference thereto, should not be infringed or abridged except in a case where it is made clearly to appear that unless there is such interference, the public will be injuriously affected. *Held* this is not such a case. *Idem*.
- PUBLIC RECORDS**—when subjects of forgery. See *Forgery*.

PUBLIC SERVICE CORPORATIONS.

See *Corporations*.

I.

IN GENERAL.

II.

RIGHT TO DISSOLVE.

III.

COMMON CARRIERS.

IV.

STREET RAILROADS.

V.

TELEGRAPH COMPANIES.

VI.

TELEPHONE COMPANIES.

I. IN GENERAL.

1. **DISCRIMINATION—REMEDY AGAINST.** Where a public service corporation discriminates in its dealings with the public there is no remedy at law, and a court of equity will exercise jurisdiction and issue a mandatory injunction to prevent such discriminations. *Public Grain & Stock Exchange v. Western Union Telegraph Company, et al.*, 548.
2. **PUBLIC USE—WHEN PROPERTY BECOMES AFFECTED WITH.** Property becomes affected with a public interest and subject to control for the common good when used in a manner to make it a public consequence and affect the community at large. *Idem.*

II. RIGHT TO DISSOLVE.

POWER OF CORPORATIONS AND JOINT STOCK ASSOCIATIONS ENGAGED IN A BUSINESS AFFECTED WITH A PUBLIC INTEREST, TO DISSOLVE. A corporation chartered to carry on a business affected with a public interest is under an obligation or duty to carry on such business during the life of its charter, and not to discontinue its business and dissolve, except with the consent of the state, but a joint stock association (such as the Wagner Joint Stock Association) organized under a law expressly providing that such associations may be dissolved in pursuance of its articles of association whose articles provide for a dissolution upon sixty days' notice given, can dissolve itself because there is a limit to the implied obligation to continue in business, granted by the state, to the effect that it should serve the state until it choose to dissolve itself in pursuance of its articles of association, nor under such a provision is there any implied obligation not to dissolve for the purpose of selling its property, or for the purpose of enabling its shareholders to sell their interest in such property, for cash or for the stock of some other corporation. *Taylor v. The Pullman Company*, 24.

III. COMMON CARRIERS.

1. **DUTY TO SERVE ALL—CONTRACT WITH THIRD PERSON—NO EXCUSE.** A common carrier cannot refuse to carry for one person because another person does not desire him to, or because the carrier is under contract not to do so. *Public Grain & Stock Exchange v. Western Union Telegraph Company, et al.*, 548.
2. **ORIGIN OR DUTY OF.** The liabilities of common carriers were originally determined by the usages of trade, and the opinions

of the judges predicated upon the obligations they assumed, and the nature of their business. *Idem*.

IV. STREET RAILROADS.

LEASE OF PROPERTY OF. A public service corporation is without power to lease all of its property, thereby disabling itself from performing its public duties. The state or any stockholder may prevent the execution of any such lease. *Townsend, et al. v. Chicago Union Traction Company, et al.*, 312.

V. TELEGRAPH COMPANIES.

1. **RIGHT OF TELEGRAPH COMPANY TO DISCRIMINATE IN DISTRIBUTION OF BOARD OF TRADE QUOTATIONS—COLLUSION WITH BOARD OF TRADE—PARTIES.** Complainant filed its bill to enjoin the defendant from removing certain "tickers" from its place of business and from discriminating against it in furnishing board of trade market quotations gathered by the telegraph company on the floor of the board of trade. An injunction was issued, an answer filed and a motion to dissolve based on such answer overruled. The telegraph company thereafter filed a supplemental answer to the effect that it was only able to gather the quotations on the floor of the board of trade with the consent of the directors of such board, that such directors had forbidden the defendant to supply the quotations to "bucket shops" and that complainant carried on such a shop. The evidence as to complainant carrying on a bucket shop was not sufficient to establish that fact. Held that the defendant could not set up such new matter in a supplemental answer where there is no allegation that there has been no collusion between the telegraph company and the board of trade, and unless the board of trade was made a party to the proceeding. *Public Grain & Stock Exchange v. Western Union Telegraph Company*, 562.
2. **RIGHT TO RECEIVE MARKET QUOTATIONS—ORDER OF THIRD PERSONS NO EXCUSE.** Where a telegraph company receives market quotations from the board of trade and the public are entitled to receive such quotations without discrimination, the court will compel the furnishing of such quotations to complainant even though the board of trade, having power to dictate to the telegraph company, has instructed such telegraph company not to furnish the quotations to complainant. If the telegraph company obtains the quotations from any source and sends them to others they must send them to all. *Public Grain & Stock Exchange v. Western Union Telegraph Company, et al.*, 548.

VI. TELEPHONE COMPANIES.

1. **RATES FOR TELEPHONE SERVICE.** Where a municipal corporation grants to a telephone company the right to use the streets for the installation of its telephone service, and as a condition of such grant the telephone company agrees that it will not increase to its present or future subscribers the rates for telephone service then established, it is the duty of such telephone company to comply with the terms of such ordinance and furnish the service agreed to be furnished at the rates fixed by the

- ordinance. *Illinois Manufacturers' Association, et al. v. Chicago Telephone Company*, 119.
2. CHARACTER OF SERVICE—RATES. Nor is it material that an improved service is furnished to such subscribers, or that such improvements were not in existence at the date of the passage of the ordinance. Having adopted the improvements it is the duty of the company as a public service corporation to furnish telephone service with all such improvements at the rates fixed by the ordinance. *Idem.*
 3. RATES FOR TELEPHONE SERVICE—RIGHT TO INCREASE ON ACCOUNT OF IMPROVED APPARATUS. Where a city grants to a telephone company by ordinance the right to transact its business in the city and it is provided in such ordinance that the telephone company shall not increase to its present or future subscribers the rates then established for telephone service, such company has no right to thereafter increase its rates even though it furnishes an improved service not known at the time of the adoption of the ordinance. *Illinois Glass Company v. Chicago Telephone Company*, 579.
 4. SAME—DUTY TO FURNISH IMPROVEMENTS. Under such ordinance the telephone company cannot be required to adopt improvements in its service or equipment but if it does so it is restricted to the rate provided for in its ordinance. *Idem.*
 5. RATES FOR TELEPHONE SERVICE—POWER OF COURT TO FIX. The court has no power to fix reasonable rates and charges for services performed by a public utility company. *Beach, et al. v. Chicago Telephone Company*, 158.
 6. RIGHT OF SUBSCRIBER TO ATTACH OWN EQUIPMENT. A provision in a contract between a telephone company and its subscriber that the subscriber shall not attach to the telephone company's wires any equipment or apparatus, not furnished by such company, is a valid regulation, and the subscriber is not justified in installing his own equipment. *Idem.*
 7. SAME. This is true even though such attachments do not interfere with the company's service, as a multiplication of such attachments might seriously interfere with the efficiency of the service. *Idem.*
 8. UNREASONABLE CHARGES FOR INSTALLATION OF EXTENSIONS. Nor is it material that the telephone company makes unreasonable charges for the installation of such attachments. *Idem.*

PUBLIC USE.

1. WHEN PROPERTY BECOMES AFFECTED WITH. Property becomes affected with a public interest and subject to control for the common good when used in a manner to make it a public consequence and affect the community at large. *Public Grain & Stock Exchange v. Western Union Telegraph Company, et al.*, 548.
2. BOARD OF TRADE. RULES OF. Neither the courts nor the legislature can interfere with the actions of the board of trade as to the control of its own floor or the discipline of its members, but the business transacted upon the floor of the board of trade is "affected with a public interest" to an extent which would authorize the legislature or the courts to prohibit such board from exercising any discrimination as to who shall receive its market quotations, or as to what telegraphic companies shall

be allowed facilities for distributing the information to the public. *Idem*.

3. DEFINED. By the "public" or "public use" is meant the people of the whole state. *Northwestern Elevated Railroad Company v. City of Chicago, et al.*, 480.

QUO WARRANTO.

1. PETITION FOR LEAVE TO FILE AN INFORMATION IN THE NATURE OF QUO WARRANTO—PRACTICE, WHERE STATE'S ATTORNEY REFUSES TO ALLOW THE USE OF HIS NAME IN PRESENTING THE PETITION. Where under the statute of *quo warranto* it is provided that a petition for leave to file an information in the nature of a *quo warranto* in the name of the people may be filed by the state's attorney of his own accord or at the instance of an individual relator, and the state's attorney refuses to allow the use of his name in presenting such petition, *held* that so far as the private rights of the relator are concerned, the use of the name of the state's attorney is a mere matter of form, a mere fiction which has come down from the English law, and that the proceeding should be dismissed so far as the rights of the people are concerned, but retaining the jurisdiction so far as the rights of the relators are concerned. *People v. Porter, et al.*, 542.
2. QUO WARRANTO PROPER REMEDY TO TEST LEGALITY OF SCHOOL DISTRICT. *Quo warranto* is the proper proceeding to test the legality of a school district and the right of the alleged board of education thereof to levy taxes. *Idem*.

RAILROADS

. See *Elevated Railroads, Carriers*.

DUTY TO FURNISH FACILITIES. A railroad company is under an obligation to furnish transportation to the public and to furnish all known appliances. It may build its own cars and operate the same if it desires, or it may lease cars and contract for service to be rendered in connection with the running thereof, with any person or corporation it sees fit. *Taylor v. The Pullman Company*, 24.

RECEIPTS—recitals in. See *Debtor and Creditor*.

RECEIVERS.

1. INSANE PERSON—EQUITABLE JURISDICTION TO APPOINT TEMPORARY RECEIVER UNTIL APPOINTMENT OF CONSERVATOR BY PROBATE COURT. Where it appears that a person is insane and incapable of managing his property and business, *held* that a court of equity has power to appoint a temporary receiver until the probate court has appointed a conservator for him. *Morris v. Roughan (Rowan)*, 525.
2. RECEIVERS—WHETHER NECESSARY PARTIES TO STOCKHOLDERS' SUIT. The receivers of a corporation are not necessary parties to a minority stockholders' suit, where the controversy relates to the voting power of certain stock held by a trustee, the legal-

ity of an election of, and the extent of the power of directors, etc. *Townsend, et al. v. Chicago Union Traction Company et al.*, 312.

RES. ADJUDICATA.

Where a Federal court has decided that there is no conflict between it and a state court this is not conclusive on the state court. *Townsend, et al. v. Chicago Union Traction Company, et al.*, 312.

RESTRAINT OF TRADE.

1. **CONTRACTS—RESTRAINT OF TRADE.** Covenants in restraint of trade generally are void, because contrary to public policy, but where the restraint is only partial, and the restriction is reasonable, such contracts are legal and will be enforced. *Oppenheimer, et al. v. Sayer*, 74.
2. **CONTRACTS EMBRACING ENTIRE STATE.** The doctrine of the common law that contracts which embrace the entire kingdom or state are void, has been modified by the later decisions. *Idem.*
3. **EMPLOYMENT CONTRACT—REASONABLENESS OF COVENANT.** An agreement by an employe not to engage in a particular business for three years after the termination of his employment is not unreasonable. *Idem.*
4. **COVENANTS NOT TO ENGAGE IN BUSINESS.** The fact that all other business pursuits are open to an employe who has agreed not to engage in a particular business does not affect the reasonableness of the covenant. This is a good answer at law, but it is an unconscionable one in equity. *Idem.*

SCHOOL DISTRICTS.

QUO WARRANTO PROPER REMEDY TO TEST LEGALITY OF SCHOOL DISTRICT. Quo warranto is the proper proceeding to test the legality of a school district and the right of the alleged board of education thereof to levy taxes. *People v. Porter, et al.*, 542.

SELF-INCRIMINATION. See *Constitutional Law, Evidence.*

SET-OFF.

ENFORCEMENT OF STOCKHOLDER'S LIABILITY—RIGHT TO SET OFF CLAIMS AS BONDHOLDERS. Where certain defendants subscribe for the bonds of a corporation and receive stock of the corporation as a bonus, and an action is instituted to enforce a stockholder's liability with respect to such bonus stock, it was held that the defendants were not entitled to set off the amount of their liability on the stock against any claim they may have on the bonds. They must first pay for their stock and then file their claim on the bonds. *Buda Foundry & Manufacturing Company, et al. v. Columbian Celebration Company, et al.*, 398.

SHERMAN ACT. See *Combinations and Monopolies.*

SPECIFIC PERFORMANCE.

WHEN NOT GRANTED. If there are any circumstances which render the enforcement of a contract unfair, harsh, oppressive or inequitable, specific performance will not be granted. *Oppenheimer v. Sayer, et al.*, 74.

STATE'S ATTORNEY.

PETITION FOR LEAVE TO FILE AN INFORMATION IN THE NATURE OF QUO WARRANTO—PRACTICE, WHERE STATE'S ATTORNEY REFUSES TO ALLOW THE USE OF HIS NAME IN PRESENTING THE PETITION. Where under the statute of *quo warranto* it is provided that a petition for leave to file an information in the nature of a *quo warranto* in the name of the people may be filed by the state's attorney of his own accord or at the instance of an individual relator, and the state's attorney refuses to allow the use of his name in presenting such petition, *held* that so far as the private rights of the relator are concerned, the use of the name of the state's attorney is a mere matter of form, a mere fiction which has come down from the English law, and that the proceeding should be dismissed so far as the rights of the people are concerned, but retaining the jurisdiction so far as the rights of the relators are concerned. *People v. Porter, et al.*, 542.

STATUTES.

See *Ordinances*.

I.

CONSTRUCTION.

II.

REPEAL.

III.

VALIDITY.

I. CONSTRUCTION.

1. CONSTRUCTION. In construing statutes the intention of the legislature is to be deduced from every part of the statute. *People v. Richards & Kelly Manufacturing Company*, 171.
2. RULE OF CONSTRUCTION. As a general rule the courts will construe statutes as declaratory of the common law and not in derogation of it. And when words are used in a statute which have a well known meaning at common law, the courts will give such words their common-law meaning. *People v. Davis, et al.*, 217.
3. DUTY TO UPHOLD. It is the duty of courts to so construe all legislative enactments as to uphold their validity if it can reasonably be done. *People v. Davis*, 245.

II. REPEAL.

1. BY IMPLICATION. In 1891 the legislature passed an act in reference to trusts and combines. In 1893 this act was amended by adding two new sections. On the same day the legislature passed an entire new act upon the same subject. *Held*, that the act of 1893 did not repeal the act of 1891, as such was not the intention of the legislature. *People v. Richards & Kelly Manufacturing Company*, 171.
2. STATUTES—REVISION OF ENTIRE SUBJECT. A statute which is an entire revision of a particular subject-matter repeals the com-

mon law upon that particular subject. *People v. Davis, et al.*, 217.

3. **REPEAL OF RAILROAD ACT.** The act of 1855 which permits railroad companies to enter into operative contracts, and to borrow money, is not in conflict with, and is not repealed by, the general incorporation act of 1872, or by the act of June 9, 1897, in relation to street railroads. *Townsend, et al. v. Chicago Union Traction Company, et al.*, 312.

III. VALIDITY.

1. **ORDINANCE—INVALID, WHERE SUBJECT TO APPROVAL OF NON-OFFICIAL BODY.** Where an ordinance, which provides that every building of a certain class shall be equipped with a fire sprinkler equipment, makes the installation of such equipment subject to the approval of a non-official body, the requirement in regard to such approval is invalid. *People v. Davis*, 245.
2. **WHETHER ENTIRE ORDINANCE INVALID.** Where an ordinance is entire, and each part has a general influence over the rest, and one part of it is void, the entire ordinance is void. The void part of the ordinance makes the whole ordinance void if the void and valid parts are so connected as to be essential to each other. If the invalid part can be separated from the other provisions of the law, and the purpose and intent of the legislature remains plain and effective, the invalid part may be disregarded. *Idem.*
3. **SAME.** The provision in the ordinance requiring the approval of the non-official body may be disregarded without impairing in any degree the purpose or usefulness of the law. *Idem.*

STOCKHOLDERS.

See *Corporations*.

CORPORATIONS—RIGHT OF STOCKHOLDER TO EXAMINE BOOKS OF SUBSIDIARY CORPORATION. Where an English corporation owns the entire stock of an American corporation, and does no other business of any kind except to own such stock, a stockholder in the English corporation is entitled to examine the books of the American corporation, and is not obliged to resort to the English courts for relief. *Fahrig v. Milwaukee & Chicago Breweries (Limited), et al.*, 296.

STREET RAILROADS.

1. **POWER TO LEASE.** Where street railroads are permitted by express statute to lease their right of way, the fact that the charter of a street railway company and the act under which the company is organized, are silent with respect to the power to lease, does not prevent the exercise of such power. *Townsend, et al. v. Chicago Union Traction Company, et al.*, 312.
2. **CONSENT OF STOCKHOLDERS.** Unless the company was expressly empowered to lease its right of way, it could not by the mere act of its directors or even without unanimous consent of its stockholders, change its character from an operating to a leasing company. *Idem.*
3. **CHANGE OF CORPORATE PURPOSE—WHETHER FUNDAMENTAL.** It is doubtful whether a change by a street railway company from

- an operating to a leasing company, is of so fundamental a character as to require the unanimous consent of all the stockholders. *Idem.*
4. LEASE OF STREET RAILWAY—CHANGE IN SAME—ESTOPPEL OF STOCKHOLDERS. Where a lease of a street railway which is not *ultra vires* in the sense that it is not void, has been acquiesced in by all of the shareholders, the shareholders are likewise estopped to question an amended lease which changes the terms of the original lease. The acquiescence of the shareholders in the original lease is not merely a consent to the terms of such lease, but also a consent that the fundamental character of the corporation should also be changed from an operating to a leasing company. *Idem.*
 5. POWER OF BOARD OF DIRECTORS TO LEASE PROPERTY. Where a street railway company leases its right of way under legislative authority, the board of directors have power to make changes in such lease. *Idem.*
 6. LEGISLATIVE POWER TO LEASE. Under the act of 1855 (Pr. L. 1855, p. 304) railroad companies have the power to lease their entire road. *Idem.*
 7. LEASE TO NON-OPERATING COMPANY. It is not essential that the lessee railroad should at the time of the lease be an operating company. *Idem.*
 8. RIGHT OF STOCKHOLDER TO ATTACK LEASE. A stockholder of a lessor street railway company has no standing to attack an amendatory lease on the ground that it was made to a non-operating company, where such stockholder had assented to the original lease. *Idem.*
 9. WHETHER COMPANY NON-OPERATING. Assuming that a lease of a street railway is inoperative because made to a non-operating company, an amendatory lease made thereafter is not invalid, where the lessee company has acquired and operated certain extensions. *Idem.*
 10. STATUTES—REPEAL OF. The act of 1855 which permits railroad companies to enter into operative contracts, and to borrow money, is not in conflict with, and is not repealed by, the general incorporation act of 1872, or by the act of June 9, 1897, in relation to street railroads. *Idem.*
 11. SAME—RIGHT OF LESSEE STREET RAILWAY COMPANY TO OWN SHARES OF STOCK OF LESSOR COMPANY. It is not against the public policy of Illinois for one street railway company to hold stock in another street railway company under certain circumstances, and where a lessee company is required to make a deposit in money or securities to secure the performance of the lease, the lessee corporation had the implied power to invest its funds in the shares of stock of the lessor company, as incident to the express power of acquiring a street railroad by lease, such purchase not being made for the purpose of securing control of the lessor company. *Idem.*
 12. FRONTAGE CONSENTS. Under the act of March 30, 1887, it is necessary to the validity of a grant of the city council to a street railroad of the right to use the streets that the petition upon which the council acts shows the consent of a majority of the owners of all private property in each mile and any fraction thereof petitioning for the construction of the road. If the petition shows such majority the action of the city council can-

- not be attacked except for fraud. *Vanderpoel, et al. v. The West and South Towns Street Railway Co.*, 299.
13. **INJUNCTION—CONSTRUCTION OF RAILROAD.** A property owner cannot maintain a bill to restrain the construction of a railway track in a public street. The injury is to the public and a private individual cannot file a bill on behalf of the public. *Idem.*
 14. **UNAUTHORIZED CONSTRUCTION.** Even though the railroad is being laid without valid municipal authority or ordinance, a property owner cannot maintain a bill for an injunction. It must be left to the municipal authorities to remedy the wrong. *Idem.*
 15. **EFFECT OF FRONTAGE LAW.** The frontage law was intended, however, to provide a remedy for the property owner where there is an unauthorized invasion of a street by a railroad company. *Idem.*
 16. **MAJORITY CONSENT.** But this remedy cannot be availed of where the majority of the frontage of the mile in which the complainant's property is located petitions for the laying of the railroad. This is true even though the ordinance is otherwise invalid. *Idem.*
 17. **FRONTAGE CONSENTS—PROPERTY OF STEAM RAILROAD NOT CONSIDERED.** In determining whether a majority of the abutting owners have consented to the laying of a street railroad, the frontage occupied by a steam railroad abutting on such street should not be taken into consideration in determining the total frontage, as steam railroads are considered as public highways. *Idem.*
 18. **LACHES.** A bill will not lie to restrain the construction of a street railway where the complainant delayed until a considerable portion of such railway had been constructed. *Idem.*
 19. **KNOWLEDGE OF ORDINANCE.** Such laches is not excused because the complainant did not know of the invalidity of the ordinance. The complainant is chargeable with notice of any defects, in the petition of the property owners, the proceedings of the city council, or the city ordinance, which are apparent on the face thereof. *Idem.*

STREETS.

See *Municipal Corporations, Ordinances, Street Railroads.*

1. **CONTROL OF BY CITIES.** It has always been the policy of the state of Illinois that the municipalities should have the control of the streets within their limits. As regards the title of the streets, the fee is vested in the city, but it owns and controls the streets as trustee only. *Northwestern Elevated Railroad Company v. City of Chicago, et al.*, 480.
2. **ELEVATED RAILROAD; EXTENT OF RIGHT OF WAY IN PUBLIC STREET.** An elevated railroad's right of way in the street is confined to so much of the street as is actually occupied by it, and to extend its structure in a public street in an extension of its right of way. *Idem.*
3. **ENCROACHMENTS ON STREETS—RIGHT OF PUBLIC TO LIGHT AND AIR.** The public have the right to insist that light and air shall penetrate every part of a street, not only to the surface but above the surface, and every encroachment upon such street, whether upon the surface or above the surface or below the surface, be-

- tween such lot lines, is against the right common to the public, that the same shall be kept free and unobstructed. *Idem.*
4. **ELEVATED RAILROADS—USE OF STREETS EXCLUSIVE.** The use and occupation of the street by an elevated railroad is not in common with the public, but is exclusive. The part of the street above the surface which it occupies is in its exclusive use and that part of the street which is necessary to support the structure is also in its exclusive occupation and for the benefit of the elevated road. *Idem.*
 5. **CITY HOLDS TITLE TO STREETS AS TRUSTEE.** The city holds the fee and the control of the streets as a trustee for the public, and in its control of the streets its ownership is subordinate to its duties as a trustee. It is not a trustee for the inhabitants of the city, but a trustee holding and controlling the streets for the public use. *Idem.*
 6. **OBSTRUCTIONS IN—POWER OF CITY TO AUTHORIZE.** It is not every obstruction of a street or sidewalk that is illegal. If the obstruction is authorized by the municipality and is properly constructed so as not to interfere with the public use of the street or sidewalk, it is not to be regarded as a nuisance. But it is indispensable that the street or sidewalk be left free for the public use and in as safe a condition as it would have been without such obstruction. *F. S. Webster Company v. Frank, et al.*, 530.
 7. **MANNER OF USE—CITY COUNCIL MAY PRESCRIBE.** The manner of the use of the streets is for the city council to prescribe, and where such city council by a general ordinance authorizes the erection of awnings over a public sidewalk no complaint can be made. *Idem.*
 8. **CITY COUNCIL—POWER TO PASS ORDINANCE AS TO ERECTION OF AWNING.** The city council under the power to "regulate the use of streets for signs, awnings, awning posts," etc., is authorized to permit the erection of awnings over sidewalks. *Idem.*

STRIKES.

THAT A STRIKE MAY RESULT IS NO EXCUSE FOR REFUSAL OF COMMON CARRIER TO RECEIVE GOODS. It is not a sufficient excuse for a common carrier, a city express company, to avoid its duty to receive and transport goods, that if it accepts the goods and carries them, all its teamsters will go on a strike, and tie up the business of the city express company or common carrier. *Marshall Field & Co. v. Becklenberg*, 59.

SUPPLEMENTAL BILLS.

1. **EFFECT OF.** A motion for leave to file a supplemental bill, and for a temporary injunction, is a waiver of a prior motion for a temporary injunction, and takes the place thereof. *Taylor v. The Pullman Company*, 24.
2. **AFTER DENIAL OF ORIGINAL APPLICATION FOR INJUNCTION.** If after the decision of the original motion for an injunction new facts arise concerning the matter in dispute, the party has a right to renew his motion for an injunction and base the same upon the pre-existing facts and pleadings in the cause and upon the new matters which are set forth in the supplemental bill. *Idem.*

TAXES.

Right of mortgagee to pay. See *Mortgages*.
 Sale of vigintillionth interest as cloud on title. *Sperry, et al. v. Stinson*, 288. Judgment reversed, 174 Ill. 125.

TAX SALES.

Rights of mortgagee as purchaser at. See *Mortgages*.
 Rule of *caveat emptor* is applicable to tax sales. *Sperry, et al. v. Stinson*, 288. Judgment reversed, 174 Ill. 125

TEAMING COMPANIES.

1. COMMON CARRIERS—TEAMING COMPANIES ARE NOT. Persons carrying on a general contract teaming business, and owning horses and wagons suitable for the hauling of goods in and about the city of Chicago, who do such hauling for their customers under time contracts at a fixed price per ton, are not common carriers, and cannot be compelled to carry goods against their will. *City of Chicago v. Forbes Cartage Co., et al.*, 473.
2. POWER OF CITY TO CONTROL AND LICENSE. As the business of such teaming companies is not affected with a public interest, it is not subject to police control. *Idem*.

TELEGRAPH COMPANIES.

1. PUBLIC-SERVICE CORPORATIONS—RIGHT OF TELEGRAPH COMPANY TO DISCRIMINATE IN DISTRIBUTION OF BOARD OF TRADE QUOTATIONS—COLLUSION WITH BOARD OF TRADE—PARTIES. Complainant filed its bill to enjoin the defendant from removing certain "tickers" from its place of business and from discriminating against it in furnishing board of trade market quotations gathered by the telegraph company on the floor of the board of trade. An injunction was issued, an answer filed and a motion to dissolve based on such answer, overruled. The telegraph company thereafter filed a supplemental answer to the effect that it was only able to gather the quotations on the floor of the board of trade with the consent of the directors of such board; that such directors had forbidden the defendant to supply the quotations to "bucket shops" and that complainant carried on such a shop. The evidence as to complainant carrying on a bucket shop was not sufficient to establish that fact. Held that the defendant could not set up such new matter in a supplemental answer where there is no allegation that there has been no collusion between the telegraph company and the board of trade, and unless the board of trade was made a party to the proceeding. *Public Grain & Stock Exchange v. Western Union Telegraph Company*, 562.
2. PARTIES—WHO ARE NECESSARY IN BILL TO COMPEL TELEGRAPH COMPANY TO FURNISH COMPLAINANT WITH MARKET QUOTATIONS OF BOARD OF TRADE. Where a bill is filed to compel a telegraph company to furnish market quotations of the board of trade, gathered by the telegraph company on the floor of such board, and it is averred that the board of trade claims such quotations as its private property and has forbidden the telegraph company to furnish the same to complainant, such board has a di-

rect interest in the litigation and is therefore a necessary party to the suit. *Idem.*

3. TELEGRAPH COMPANIES FURNISHING MARKET QUOTATIONS—WHETHER AFFECTED WITH A PUBLIC USE. Where a telegraph company as incident to its regular telegraph business procures market quotations on the board of trade and circulates such quotations over "tickers," such incidental business is affected with a public use, and the quotations must be furnished to all alike without discrimination. *Public Grain & Stock Exchange v. Western Union Telegraph Company, et al.*, 548.

TELEPHONES.

1. RATES FOR TELEPHONE SERVICE—POWER OF COURT TO FIX. The court has no power to fix reasonable rates and charges for services performed by a public utility company. *Beach, et al. v. Chicago Telephone Company*, 158.
2. RIGHT OF SUBSCRIBER TO ATTACH OWN EQUIPMENT. A provision in a contract between a telephone company and its subscriber that the subscriber shall not attach to the telephone company's wires any equipment or apparatus, not furnished by such company, is a valid regulation, and the subscriber is not justified in installing his own equipment. *Idem.*
3. This is true even though such attachments do not interfere with the company's service, as a multiplication of such attachments might seriously interfere with the efficiency of the service. *Idem.*
4. UNREASONABLE CHARGES FOR INSTALLATION OF EXTENSIONS. Nor is it material that the telephone company makes unreasonable charges for the installation of such attachments. *Idem.*
5. INJUNCTION. The subscribers are entitled to an injunction restraining the telephone company from interfering with their telephone service, conditioned, however, upon such subscribers removing the foreign attachments from their telephone. *Idem.*
6. RATES FOR TELEPHONE SERVICE. Where a municipal corporation grants to a telephone company the right to use the streets for the installation of its telephone service, and as a condition of such grant the telephone company agrees that it will not increase to its present or future subscribers the rates for telephone service then established, it is the duty of such telephone company to comply with the terms of such ordinance and furnish the service agreed to be furnished at the rates fixed by the ordinance. *Illinois Manufacturers' Association, et al. v. Chicago Telephone Company*, 119.
7. CHARACTER OF SERVICE—RATES. Nor is it material that an improved service is furnished to such subscribers, or that such improvements were not in existence at the date of the passage of the ordinance. Having adopted the improvements it is the duty of the company as a public service corporation to furnish telephone service with all such improvements at the rates fixed by the ordinance. *Idem.*
8. ORDINANCES—WHETHER PUBLIC LAWS OR PRIVATE CONTRACTS. Such an ordinance is not a mere private or business contract between the city and the telephone company, but is an exercise of the sovereign or governing power of the state delegated to the city by its charter. *Idem.*

9. **ORDINANCES—PRACTICAL CONSTRUCTION—ESTOPPEL AND ACQUIESCENCE.** There can be no estoppel against the enforcement of an ordinance which is a public law, by reason of any practical construction placed thereon by the parties or by acquiescence in such practical construction. *Idem.*
10. **PAYMENT IN EXCESS OF RATE FIXED BY ORDINANCE—WHETHER VOLUNTARY.** Where a public service corporation exacts charges in excess of those allowed by law, the payment of such charges is not regarded as voluntary, nor is the making of any protest or objection necessary in order to recover back such excess charges. *Idem.*
11. **DUTY TO FURNISH MODERN EQUIPMENT AT RATES FIXED BY ORDINANCE.** Where a telephone company accepts an ordinance under which it is permitted to use the streets of the city for the purpose of placing its poles and wires, and it is provided in such ordinance that the company shall not increase the rates then established for telephone service, the company is bound to furnish telephones of modern construction and appliances at the ordinance rate. *Illinois Glass Company v. Chicago Telephone Company*, 579.
12. **RATES FOR TELEPHONE SERVICE—RIGHT TO INCREASE ON ACCOUNT OF IMPROVED APPARATUS.** Where a city grants to a telephone company by ordinance the right to transact its business in the city and it is provided in such ordinance that the telephone company shall not increase to its present or future subscribers the rates then established for telephone service, such company has no right to thereafter increase its rates even though it furnishes an improved service not known at the time of the adoption of the ordinance. *Idem.*
13. **DUTY TO FURNISH IMPROVEMENTS.** Under such ordinance the telephone company cannot be required to adopt improvements in its service or equipment, but if it does so it is restricted to the rate provided for in its ordinance. *Idem.*

TENANCY IN COMMON. See *Conveyances*.

TENDER.

To stop the running of interest in case of a tender, the tender should be kept good by paying the money into court. *Sperry et al. v. Stinson*, 288. Judgment reversed, 174 Ill. 125.

THEATERS.

See *Negligence, Homicide, Ordinances*.

PLACES OF AMUSEMENT—DUTY TO PROVIDE SAFE PLACE. Proprietors of places of amusement are bound to provide a safe place for their patrons and to exercise reasonable care for their safety. *People v. Davis*, 245.

TRADE-MARKS AND TRADE NAMES.

1. **DISTINCTION BETWEEN TRADE-MARKS AND TRADE NAMES—RIGHT TO EXCLUSIVE USE OF TRADE NAME.** "Trade-mark" and "trade name" are nearly synonymous. There is no exclusive right in a trade name unless such name has the distinguishing qualities of a trade-mark and is used to distinguish the goods, wares and merchandise of the user. *New York Dental Parlors v. Froom, et al.*, 460.

2. INFRINGEMENT—NECESSITY OF. In the absence of fraud, deception or unfair competition, the user of a trade name cannot enjoin its use by others. *Idem.*
3. GEOGRAPHICAL NAME. A geographical name or term cannot be protected as an exclusive trade-mark. It must be supplemented by other words which import quality or standard. *Idem.*
4. MISLEADING NAME. Where complainants use a geographical name which is misleading, the court will not protect such name as a trade-mark. *Idem.*
5. BUSINESS PLANS AND SYSTEMS—INJUNCTION AGAINST USE OF. The complainants commenced issuing in serial parts a portfolio of sights and scenes of the world. These parts were issued and distributed under contract by certain newspapers in exchange for coupons clipped from such newspapers. This plan was originated by the complainants and proved to be a great success. The defendants thereafter issued a similar book and adopted substantially the same plan in doing its business. The parts were not copyrighted and the original pictures were purchased in the open market. *Held*, there being no copyright, trade-mark or trade name involved, that a court of equity would not grant relief, as there can be no proprietary rights merely in a plan of doing business. *The Werner Company v. W. B. Conkey Company, et al.*, 91.
6. CORPORATE NAMES—RIGHT OF ONE ILLINOIS CORPORATION TO ENJOIN THE RECORDING OF A CERTIFICATE OF INCORPORATION OF ANOTHER ILLINOIS CORPORATION OF A SIMILAR NAME. Certain of the defendants procured from the secretary of state a final certificate of incorporation of "The Elgin National Watch Case Company, of Elgin, Illinois," but before this certificate was recorded in the office of the recorder of deeds of Kane County, Illinois, as required by statute, "The Elgin National Watch Company" and the "Elgin Watch Case Company" obtained a temporary injunction restraining the recording of the certificate of organization of "The Elgin National Watch Case Company, of Elgin, Illinois." Upon motion of defendants to dissolve the injunction theretofore granted, *held* that the names were so similar that confusion would result, and that the defendants should be enjoined from procuring to be recorded in the recorder's office the certificate of incorporation of "The Elgin National Watch Case Company of Elgin, Illinois." *Elgin National Watch Company v. Eppenstein, et al.*, 602.
7. POWER OF ILLINOIS CORPORATION TO PREVENT THE ORGANIZATION OF ANOTHER ILLINOIS CORPORATION OF A SIMILAR NAME. The legislature has by implication provided that an Illinois corporation may, by proper legal proceedings, prevent the organization of any other corporation under the laws of this state, with the same or a similar corporate name, when the consent thereto of such existing corporation has not been obtained. *Idem.*
8. PROTECTION OF. When parties have, by their mode of doing business, and by the quality of their products, and, by selling and delivering to the public articles as valuable as represented, built up under a chosen name a reputation which is of great value, they should be protected in the use of that name; and the protection of the public in preventing any other persons from assuming a like or similar name is at the same time a protection of the parties. *Idem.*

9. **UNFAIR TRADE.** The words "Elgin" and "National" and "Watch" are general or geographical words or names that can not be appropriated to the exclusion of others; but they may be so used when taken together or in connection with certain manufactured articles as to create and establish a special signification, and in the use of those words, or any or either of them, in such connection, and with such special signification, the parties entitled thereto should receive protection from the courts. *Idem.*
- TRUSTS.** See *Combinations and Monopolies.*

TRUSTS AND TRUSTEES

I.

IN GENERAL.

II.

MASSSES FOR THE SOUL.

I. IN GENERAL.

1. **WHETHER ACTIVE OR PASSIVE.** A *passive* trust exists as where land is conveyed to A in trust for B without any power to take actual possession of the land or to exercise acts of ownership over it. *Active* trusts exist where the trustee is charged with the performance of active and special duties in respect to the management of the trust company. *Korn, et al. v. Sears, et al.,* 372.
2. **WHERE TRUSTEE HAS MANAGEMENT OF PROPERTY—STATUTE OF USES.** Where trustees are empowered by will to conduct and manage an estate for the benefit of testator's wife and child, this constitutes an *active* trust, and the statute of uses does not vest the legal title in the *cestuis que trustent*. *Idem.*
3. **CONVEYANCE ACT—APPLICATION TO EQUITABLE ESTATES.** Section 13 of the conveyance act which dispenses with the word "heirs" in the granting of estates, applies to both legal and equitable estates. *Idem.*
4. **EQUITABLE ESTATES—WHAT CONSTITUTES.** An equitable estate only exists where the *cestui que use*, or the beneficial owner, has a right to demand an immediate conveyance of the legal title. *Idem.*
5. **EQUITABLE ESTATE—IN CASE OF ACTIVE TRUST.** Where a trustee has the right to take possession and exercise active ownership over the property, the trust is an *active* trust, and the estate of the *cestui que trust* is not an equitable estate, because the beneficiary has no right to compel or demand the immediate transfer of the *legal* estate. *Idem.*
6. **NATURE OF BENEFICIARIES' ESTATE.** A conveyance to trustees in trust for the "wife and child" of the testator is presumed to be a conveyance in fee simple in the beneficial use of the property for the maintenance and support of such beneficiaries. *Idem.*
7. **FOR SUPPORT AND MAINTENANCE OF TESTATOR'S FAMILY—HOW LONG TO CONTINUE.** A conveyance to trustees for the maintenance and support of the "wife and child" of the testator will continue only so long as the child remains such. When such child arrives of age, the trust would cease. The same situation would exist where the child dies before becoming of age. *Idem.*

8. **BENEFICIARIES—JOINT OR SEVERAL.** Where a trust estate is created for the benefit of a wife and child, it will be considered that it was created for their joint benefit. If therefore the trust ceases as to one beneficiary it would cease as to both. *Idem.*
9. **NATURE OF BENEFICIARIES' ESTATE.** Upon the determination of such an estate the beneficiaries would become tenants in common. *Idem.*
10. **STOCK AND STOCKHOLDERS—LIABILITY OF TRUSTEE.** Where certain shares of stock are deposited with a bank as trustee to deliver the same to the subscribers for bonds of the corporation as a bonus, and such bank merely acts as a conduit through which the corporation transfers said stock to the bondholders, such bank is not liable as a stockholder within the meaning of section 25 of the General Incorporation Act of Illinois. *Buda Foundry & Manufacturing Company, et al. v. Columbian Celebration Company, et al.*, 398.
11. **PARTIES—CESTUI QUE TRUST.** A *cestui que trust* is not a necessary party to litigation in which he is represented by the trustee. *Townsend, et al. v. Chicago Union Traction Company, et al.*, 312.

II. MASSES FOR THE SOUL.

1. **STATUTE OF FRAUDS.** The decedent deeded certain personal property, upon oral directions that the fund should be devoted to the procurement of masses for the soul of the decedent and his mother. *Held*, that the trust was not void because not wholly in writing, as the statute of frauds does not embrace trusts as to personal property, but only as to realty. *Kehoe v. Kehoe, et al.*, 164.
2. **SUPERSTITIOUS USES.** At common law gifts or devises for procuring masses are void, as being for superstitious uses. *Idem.*
3. **ENGLISH STATUTES.** The English statutes concerning the disposition of property for superstitious uses are inapplicable to our conditions and inconsistent with our institutions, and never became a part of our law. The origin of the Illinois statutes as to the adoption of the common law traced. *Idem.*
4. **RELIGIOUS BELIEF.** The right of a person to devote his property to what he conceives is a religious purpose, such as the procurement of masses for the soul, is just as necessary to the religious liberty guaranteed by the constitution, as the right to believe and worship according to the dictates of one's own conscience. *Idem.*
5. **SAME.** A bequest for the procurement of masses for the donor's soul is a void bequest. *Idem.*

ULTRA VIRES.

See *Corporations*.

1. **PULLMAN COMPANY—POWER TO PURCHASE ASSETS OF WAGNER COMPANY ENGAGED IN SAME BUSINESS.** Under its charter the Pullman Company had power to purchase railway cars without limitation as to the number or as to the party from whom the purchases may be made, and also all the powers, privileges, rights, etc., incident to such corporations and necessary or useful for the purposes of the corporation. *Held* that the

Pullman Company immediately upon its organization could have made a purchase of the assets of the Wagner Company engaged in like business "as incident to, necessary and useful" to it in the commencement of its business, and having such power at the start of its business it could make such purchase at any time thereafter that it was considered necessary or useful in carrying on the business of the corporation; and whether such purchase would be necessary or useful was for the board of directors to determine; and while such purchase might be an abuse of the charter power it was not an *ultra vires* act. *Taylor v. The Pullman Company*, 24.

2. **STOCKHOLDER OF ONE CORPORATION CANNOT COMPLAIN OF ULTRA VIRES ACTS OF ANOTHER CORPORATION.** A stockholder in one corporation has no footing in a court of equity to enforce purely public, or redress purely private rights as to or in connection with alleged *ultra vires* acts of another corporation. That is left to the people of the state under which the corporation had its charter, or to the stockholders or creditors having an interest. *Idem*.
3. **RIGHT OF STOCKHOLDER TO QUESTION.** A stockholder has a standing to question the *ultra vires* acts of his own corporation by which he may be injured because of the trust relation existing between him and the corporation. *Idem*.
4. **POWER TO PURCHASE CARS, RIGHTS OF CORPORATION UNDER.** The power to purchase cars and lease the same to railroad companies confers power to purchase cars which are already leased to railroad companies. *Idem*.
5. **INJUNCTION TO RESTRAIN ULTRA VIRES CORPORATE ACTS.** A corporation can exercise only such powers and privileges as its charter confers; if it transcends its charter powers the state can elect to proceed at law to annul the charter or in chancery to enjoin it from acting *ultra vires*. *People ex rel. Moloney v. Chicago Fair Grounds Association*, 108.
6. **CITIES—ESTOPPEL.** A city cannot be estopped to dispute the validity of an *ultra vires* contract. *Northwestern Elevated Railroad Company v. City of Chicago, et al.*, 480

UNLAWFUL ACT.

"UNLAWFUL ACT" DEFINED. The words "unlawful act," as used in the statute defining manslaughter, mean unlawful as defined by the common law, and include not only criminal acts, but trespasses and civil wrongs which are not prohibited by statute. *People v. Davis, et al.*, 217.

USES, STATUTE OF.

WHERE TRUSTEE HAS MANAGEMENT OF PROPERTY. Where trustees are empowered by will to conduct and manage an estate for the benefit of testator's wife and child, this constitutes an *active* trust, and the statute of uses does not vest the legal title in the *cestui que trustent*. *Korn, et al. v. Sears et al.*, 372.

VACANCIES.

BOARD OF DIRECTORS—VACANCIES—How FILLED. The statute in relation to the election of directors provides that directors must

be elected by the stockholders and states that "all other vacancies to be filled in accordance with by-laws." *Held* that inasmuch as it was the universal practice in Illinois for at least 35 years to permit vacancies in the board of directors to be filled by the other members of the board, that the court would not overthrow such a long settled practice, by holding that such vacancies must be filled by the stockholders. *Townsend, et al. v. Chicago Union Traction Company, et al.*, 312.

VENUE, CHANGE OF.

See Criminal Law.

1. **LOCAL PREJUDICE.** A change of venue will seldom be granted from a large city where many men are eligible for jury service; but where the defense presents over 12,000 affidavits as to the existence of prejudice, and the state about 4,000 counter affidavits, the change of venue must be granted. *People v. Davis*, 207.
2. **APPLICATION FOR—MERE NUMBER OF AFFIDAVITS.** Mere numbers alone of affidavits that the defendant cannot receive a fair trial in the county do not govern the granting of the change of venue, but the character and reputation of the persons making the affidavits will be considered. *Idem.*
3. **CHARACTER AND NUMBER OF AFFIDAVITS.** Where vast numbers of affidavits of prejudice are presented, among which are those of large numbers of prominent men, the court will grant the change of venue, and such a record is conclusive upon the court that prejudice still exists although the catastrophe for which the defendant was indicted occurred a year or more previous. *Idem.*
4. **TIME OF APPLICATION.** Where a petition for a change of venue from the county alleges that there is such a prejudice on the part of the people against the petitioner that he cannot have a fair and impartial trial, and that he did not become aware of such prejudice until September 27, 1904, at some time after 4 p. m., and notice of the application for a change of venue was served at 9:30 a. m. on the following day, it was *held* that the application was made in apt time. *People v. Davis, et al.*, 191.
5. **CRIMINAL CASES.** Where a defendant in a criminal case cannot have a fair trial in the county where he resides or where the offense is committed he is entitled to a change of venue. *Idem.*
6. **SAME.** Nor is such right affected by the fact that such change of venue would greatly increase the expense of trial to the state. *Idem.*
7. **DUTY OF STATE.** If the state's attorney on an application for a change of venue believes that no prejudice in fact exists it is his duty to contest the application. If, on the other hand, he believes that a prejudice does exist he should consent to the making of the change and not charge the court with the responsibility of doing so. *Idem.*

VIGINTILLIONTH.

TAXES—SALE OF VIGINTILLIONTH INTEREST. The sale of a vigintillionth of certain land for the non-payment of taxes is not a cloud upon the title, and a mortgagee redeeming from such a

sale cannot charge the amount so paid against the mortgagor. The maxim, *de minimus non curat lex*, applies. *Sperry v. Stinson*, 288. Judgment reversed, 174 Ill. 125.

VOLUNTARY PAYMENT. See *Payments, Duress, Telephone Companies*.

WAGES

UNEARNED WAGES—VALIDITY OF ASSIGNMENT OF. Although the authorities are conflicting as to whether or not unearned wages may be assigned so as to be recoverable in an action at law, the better doctrine is that except as to wages actually due at the time of the assignment, such an assignment is an attempt to transfer a mere possibility of future earnings, and therefore as to such future earnings is not an existing chose in action. *Silverstein v. Gresheimer*, 471.

WORDS AND PHRASES.

"Criminal Case," *People v. Richards & Kelly Manufacturing Company*, 171.

"Public Use." By "*public*" or "*public use*" is meant the people of the whole state. *Northwestern Elevated Railroad Company v. City of Chicago, et al.*, 480.

"Public Cart." A teaming company which carries goods within a city for certain customers under private contract at a fixed price per ton, and does not hold itself out as undertaking for hire to transport the goods of any person applying to them, is not a common carrier, and does not come within the meaning of a city ordinance regulating and licensing "*public carts*." *City of Chicago v. Forbes Cartage Co., et al.*, 473.

"Public Policy." *Taylor v. The Pullman Company*, 24.

"Unlawful Act," *People v. Davis, et al.*, 217. *People v. Davis*, 245.

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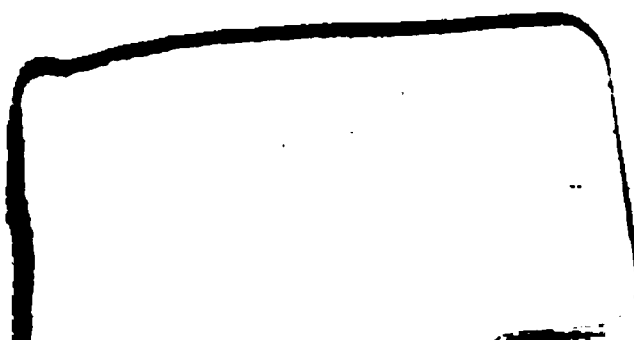
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